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No. _____

IN THE

Supreme Court of the United States

JOHN R. D'ALESSIO, D'ALESSIO SECURITIES, INC.,

Petitioners,

—v.—

NEW YORK STOCK EXCHANGE, INC., RICHARD A. GRASSO, EDWARD A. KWALWASSER, and ROBERT J. MCSWEENEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the federal courts have jurisdiction over controversies in which common law causes of action are alleged to have also incidentally involved a violation of a federal statute, but where the interpretation of that federal statute is not in dispute, and that federal statute is in no other way relevant to the action.

2. Is a self-regulatory organization under the Securities Exchange Act, such as the New York Stock Exchange, entitled to absolute immunity for all of its non-adjudicatory and non-prosecutorial functions and conduct, or should such organizations be subject to the same restrictions on the doctrine of absolute immunity as federal officials are.

3. Is the New York Stock Exchange entitled to absolute immunity for breach of contract.

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioner, John D'Alessio, is an individual and resident of the State of Florida. Petitioner, D'Alessio Securities, Inc., is a private corporation owned entirely by Petitioner, John D'Alessio, and has no subsidiaries.

Respondents

The New York Stock Exchange, Inc, is a New York Corporation with no parent corporation and no issued stock. Respondent, Richard A. Grasso, is the Chairman of the Board of Directors of the New York Stock Exchange. Respondents, Edward Kwalwasser and Robert J. McSweeney, are officers of the NYSE.

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OPINION BELOW

The opinion of the Court of Appeals on the merits is reported at 258 F. 3d 93 (2d Cir. 2001) and is reproduced in the Appendix at 1a-24a. The opinion of the United States District Court for the Southern District of New York is reported at 125 F. Supp. 2d 65 (S.D.N.Y. 2001), and is reproduced in the Appendix at 25a-30a.

JURISDICTION

The opinion of the Court of Appeals was issued on July 19, 2001. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

This case originated in New York State court when Petitioners sued Respondents on four common law causes of action under New York State law: (1) injurious falsehood and concealment; (2) fraudulent deceit and concealment; (3) negligent misrepresentation; and (4) breach of contract. The Complaint alleged that Respondents, the New York Stock Exchange ("NYSE") and three of its senior officers, had deliberately and negligently misled Petitioners, formerly floor brokers and members of the NYSE, into violating Title 15, U.S.C. Section 78(k)(a)(1) ("Section 11(a)") of the Securities Exchange Act ("Exchange Act") and Title 17, CFR, Section 240.11(a-1) ("Rule 11a-1)"), which prohibit members of securities exchanges from trading for their own accounts or accounts in which they have interests. The Complaint alleged that the Respondents caused Petitioners to be informed that Petitioners could legally share profits with their customers as a form of commission and that such compensation would not be equivalent

to Petitioners' trading for their own account or for an account in which they had an interest, in violation of Section 11(a) and Rule 11a-1. It was alleged that this advice, which to any experienced lawyer was patently false, was given for, among other reasons, financial reasons, as compensation to the NYSE from Petitioners was based in part on the number of shares they traded, which Respondents were aware would be much greater if profits were shared with customers by independent floor brokers such as Petitioners. As a result of this advice, Petitioners engaged in such a compensation agreement with one of their customers. When this arrangement, and many other similar arrangements involving other independent floor brokers, was subsequently brought to the attention of the federal prosecutor, a criminal investigation was immediately commenced. As part of its investigation, the federal prosecutor summoned Respondents to give information. When they were questioned, Respondents falsely denied they had approved of such compensations. These false statements led directly to the arrest and indictment of Petitioner, John D'Alessio, for violations of Section 11(a) and Rule 11a-1. The Complaint alleges that the Government dismissed Petitioner's indictment when it learned that Respondents' denials that they had approved of such compensation arrangements were false, as the Government concluded that Petitioner D'Alessio lacked *mens rea* to be criminally culpable.

The Complaint alleges that the SEC itself also found that the NYSE interpreted the rules illegally to permit independent floor brokers at the NYSE, such as Petitioners, to share profits with their customers. The SEC sued the NYSE finding that its "interpretation" of the law caused many of its members, including Petitioners, to engage in this practice.

It was after the dismissal of Petitioner D'Alessio's indictment that he instituted suit against Respondents in New York State Court, alleging only state causes of action. Although the Complaint alleged that Petitioners had inadvertently violated Section 11(a) and Rule 11a-1, when they shared profits with one of their customers based on advice they had been given by the NYSE and its senior officers, there never was a dispute in this litigation as to the correct interpretation of this statute and rule. Both Petitioners and Respondents took the position throughout this litigation, as did all the Courts below, that a floor broker sharing profits with his customer was in fact trading for his own account and trading for an account in which he held an interest, in violation of Section 11(a) and Rule 11a-1. Thus no interpretation of federal law was required to be made in this lawsuit. The existence in this case of this federal statute and rule were merely incidental to the Complaint.

Following the removal of the case to District Court, the District Court found that there was federal question jurisdiction based upon the existence in the case of Section 11(a) and Rule 11a-1. The Court of Appeal agreed. Moreover, having found federal question jurisdiction, the Court of Appeals agreed with the District Court that the NYSE and its senior officers are entitled to absolute immunity for the four common law causes of action alleged. The Court of Appeals found that the NYSE, a self-regulatory organization under the Exchange Act, was entitled to absolute immunity for all of its self-regulatory duties under the Exchange Act, and not only for its prosecutorial or adjudicatory responsibilities, which include its disciplinary functions, imposed under that act. The Court of Appeal went so far as to affirm the District Court's opinion affording absolute immunity to the NYSE for breaching its contract with Petitioners. Petitioners had alleged in their complaint that they had

entered into a contract with the NYSE in which, in return for Petitioners' agreement to pay fees to the NYSE, and other promises, the NYSE promised Petitioners that it would "advise them fairly and accurately of the rules and laws under which they must operate, . . ." Petitioners alleged that when Respondents advised them that they could legally share profits with their customers, which was patently false advice and which ultimately cause them much harm, including the destruction of their business and the arrest of Petitioner John D'Alessio, they breached this contract.

ARGUMENT

THE LOWER COURTS FINDING OF FEDERAL QUESTION JURISDICTION VIOLATED THE RULE THIS COURT SET DOWN IN *MERRELL DOW PHARMACEUTICALS, INC. V. THOMPSON*

There was no federal question in this case which supported the removal of the case to the District Court. The Compliant alleged common law causes of action only. Although the Complaint alleged that Respondents caused Petitioners to violate Section 11(a) and Rule 11a-1, the existence in this case of this federal statute and Rule was incidental only. The interpretation of this statute and rule was not in question. All parties, as well as the District Court, agreed to the SEC's interpretation of these provisions, which it had made before Petitioners filed suit, when the SEC discovered that the NYSE had permitted its members to share profits with their customers. There was thus no dispute in this case that both the statute and the rule prohibited members of the NYSE from sharing profits with their customers. The involvement of these provisions in this case was incidental only and did not raise a substantial federal issue.

The Court of Appeals' finding of federal question jurisdiction misapplied this Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). *Merrell Dow* held that "the mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction". *Id.* at 813. Here, although Section 11(a) of the Exchange Act and Rule 11a-1 were relevant to the Complaint, they were not essential to the tort claims at all. Indeed, Petitioners' Complaint was little different from the Complaint in *Barbara v. New York Stock Exchange*, 99 F. 3d 49 (2d Cir. 1996) in which the Second Circuit found that removal from state court was improper because there was no substantial federal question, despite the fact that the Complaint in *Barbara* alleged violations of the Exchange Act. The Second Circuit held, following *Merrell Dow, supra*, that the mere existence of a federal statute in an action does not confer federal jurisdiction. This was the exact situation here where there was no dispute that Petitioners' conduct violated the statute and the rule. Since these provisions are in no other way relevant to this case, there is no basis to find federal jurisdiction in this case. To accept the Second Circuit's interpretation of the meaning of a "federal question" will inundate the federal courts with state common law causes of action which only incidentally involve a federal statute.

The NYSE Was Not Entitled to Absolute Immunity

This Court has held that the doctrine of absolute immunity is to be restricted to the prosecutorial and adjudicatory functions of federal officials, and does not extend to all of their regulatory functions. See *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Burns v. Reed*, 500 U.S. 478 (1991); *Butz v. Economou*, 438 U.S. 478 (1978). Here, Petitioners did not claim harm from the NYSE's prosecutorial or adjudicatory functions under

the Exchange Act. The Complaint says not a word about that.

In *Barbara v. New York Stock Exchange, supra*, the Court of Appeals for the Second Circuit applied the doctrine of absolute immunity to protect private securities exchanges such as the NYSE when they act under their disciplinary responsibilities imposed upon it by the Exchange Act, including disciplining members for violations of the rules. Thus in *Barbara* the NYSE was afforded absolute immunity when it was sued by a former member who alleged that the NYSE had abused its disciplinary authority conferred upon it by the Exchange Act. This holding was merely the application of Supreme Court holdings involving federal officials to officers of private entities with self-regulatory functions.

In the case here the Court of Appeals expanded the doctrine of absolute immunity to cover securities exchanges for all of their regulatory duties imposed under the Exchange Act, and not merely their prosecutorial and adjudicatory responsibilities. This kind of expansive application of the doctrine of absolute immunity would even protect securities exchanges from antitrust violations, having nothing whatever to do with the prosecutorial or adjudicatory functions of these exchanges. As this Court has limited the doctrine of absolute immunity to the prosecutorial and adjudicatory functions of federal officials, it was clearly improper for the Court of Appeals to expand this protection to all regulatory duties and functions of private securities exchanges.

The Complaint in this case had nothing whatever to do with any disciplinary functions of the NYSE against Petitioners, although the NYSE attempted to inject this irrelevancy in this case in an effort to have it fall within the Second Circuit's decision in *Barbara, supra*, which

involved an internal disciplinary action against a former member of the NYSE. The Compliant here states nothing about a disciplinary action against Petitioners. Moreover, although the Court of Appeals stated in its opinion that absolute immunity was justified because the NYSE had acted in its "referral" capacity under the Exchange Act when it referred Petitioners' conduct to the federal prosecutors, no such event had occurred here at all. On the contrary, the Compliant alleged that the NYSE itself was a target of the criminal investigation and was summoned by the Government to answer questions. It was then, according to the Complaint, that the Respondents falsely claimed that they had not approved Petitioners trading and billing practices. It was when the Government learned that these assertions were false, that the Government dismissed the indictment against Petitioner, John D'Alessio. It was then also that the SEC sued the NYSE, finding that it allowed brokers to violate the law. The Court of Appeals' statement that the NYSE made a "referral" to the federal prosecutor was a significant factual error.

The Breach of Contract Action

The Court of Appeals afforded the NYSE absolute immunity even for breach of contract, affirming the District Court's opinion. Even if the NYSE is entitled to absolute immunity for all of its regulatory duties, in addition to its prosecutorial and adjudicatory functions, it was error to find that the NYSE's entering into a contract with Petitioners is a part of its regulatory duties. There is simply no authority for conferring absolute immunity on a self-regulatory organization for breach of contract. Even the SEC is free to be sued for breaching its contracts. See *Gugliaro v. New York Coffee, Sugar and Cocoa Exchange, Inc.* 1997 U.S. Dist. Lexis 2718 (S.D.N.Y. March 11, 1997), which makes the distinction

between actions of a self-regulatory organization for which it is entitled to immunity and actions such as breach of contract for which it is not so entitled.

CONCLUSION

For the foregoing reasons the Petition should be granted to correct the errors made by the Court of Appeals and to clarify the law in the United States.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2000

(Argued May 2, 2001 Decided July 19, 2001)

Docket No. 00-9320

JOHN R. D'ALESSIO, D'ALESSIO SECURITIES, INC.,

Plaintiffs-Appellants,

—v.—

NEW YORK STOCK EXCHANGE, INC., RICHARD A. GRASSO, EDWARD A. KWALWASSER, and ROBERT J. MCSWEENEY,

Defendants-Appellees.

Before:

MESKILL and KEARSE, *Circuit Judges*, and SQUATRITO,* *District Judge*.

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* Hon. Dominic J. Squatrito, United States District Judge for the District of Connecticut, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York, Rakoff, *J.*, granting a motion by defendants-appellees the New York Stock Exchange and various officials thereof for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) and dismissing the complaint with prejudice.

Affirmed.

DOMINIC F. AMOROSA, New York City, *for Appellants.*

DEBRA M. TORRES, New York City (Harvey L. Pitt, Daniel E. Loeb, Fried, Frank, Harris, Shriver & Jacobson, New York City, of counsel), *for Appellees.*

MESKILL, *Circuit Judge*:

Plaintiffs-appellants John R. D'Alessio and his wholly owned company D'Alessio Securities, Inc. (collectively "D'Alessio") appeal from the September 29, 2000 judgment of the United States District Court for the Southern District of New York, Rakoff, *J.*, dismissing the complaint against defendants-appellees the New York Stock Exchange, Inc., Richard A. Grasso, Edward A. Kwalwasser and Robert J. McSweeney (collectively the "NYSE")[1] on the ground that the NYSE enjoyed absolute immunity from a suit seeking monetary damages arising from the NYSE's allegedly improper exercise of the reg-

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[1] At all relevant times, Grasso was the Chairman of the NYSE, Kwalwasser was a Group Executive Vice President of the NYSE, responsible for Market Surveillance, Enforcement and Member Firm Regulation, and McSweeney was a senior Vice President of the NYSE in charge of the Market Surveillance division.

ulatory and adjudicatory functions delegated to it under the Securities Exchange Act of 1934, as amended (Exchange Act). Because we conclude that the district court had jurisdiction over the present action and that the NYSE is entitled to immunity from suits for damages that arise out of its conduct as alleged in the complaint, we affirm the judgment of the district court in its entirety.

BACKGROUND

The district court set forth in detail the facts relevant to this dispute in its opinion and order, *see D'Alessio* v. *N.Y. Stock Exch.*, 125 F.Supp.2d 656, 657-58 (S.D.N.Y. 2000), familiarity with which is assumed. We restate here only those facts relevant to the appellate arguments or otherwise necessary for context.

In *Barbara* v. *New York Stock Exch.*, 99 F.3d 49 (2d Cir. 1996), we detailed the role the NYSE plays vis-a-vis the Securities and Exchange Commission (SEC) in the regulation of securities transactions executed on the floor of the NYSE and the initiation of disciplinary proceedings in cases where a member person or firm fails to comply with the Exchange Act and the rules and regulations promulgated thereunder:

> The [NYSE] is a nonprofit New York corporation registered with the [SEC] as a national securities exchange pursuant to section 6 of the [Exchange Act], 15 U.S.C. § 78f. As an association of securities dealers, the [NYSE] authorizes its members to effectuate securities transactions on its auction market, known as the [NYSE] floor. Under the [Exchange] Act, the [NYSE] is a "self-regulatory organization [(SRO)]," *see* 15 U.S.C. § 78c(a)(26), which means that it has a duty to promulgate and enforce rules

> governing the conduct of its members, *see id.* §§ 78f(b), 78s(g). These rules are subject to SEC approval. *See* 15 U.S.C. § 78s(b). In accordance with the statutory scheme, the [NYSE] conducts disciplinary proceedings when a member, or a person associated with a member, is suspected of violating federal securities laws or internal [NYSE] rules or regulations. *See Id.* § 78f(d). The [Exchange] Act requires that these disciplinary proceedings be conducted in compliance both with the [Exchange] Act and with the [NYSE's] rules and regulations. *See Id.* § 78s(g)(1). Notice of any final disciplinary sanction imposed by the [NYSE] must be provided to the SEC, *see id.* § 78s(d)(1), and the imposition of a sanction is subject to review by the SEC on its own motion or at the instance of an aggrieved party, *see id.* § 78s(d)(2).

Id. at 51 (internal citation omitted); *see also Sparta Surgical Corp.* v. *Nat'l Ass'n of Sec. Dealers*, 159 F.3d 1209, 1212 (9th Cir. 1998) ("The Exchange Act requires self-regulatory organizations to comply not only with the Exchange Act, but also with the association's own rules."). The failure of an SRO to comply with these requirements carries serious repercussions: the SRO risks being subject to the SEC's broad sanctioning power that includes suspension or revocation of the SRO's registration, or a "censure or . . . limitation[ ] upon the activities, functions, and operations of [the SRO]." 15 U.S.C. § 78s(h)(1).

The instant appeal arises out of investigations conducted by the SEC and the United States Attorney's Office targeting groups of independent floor brokers, commonly referred to as "$2.00 brokers," who regularly execute trades on the NYSE floor. The government suspected some of these brokers of violating section 11(a)

of the Exchange Act and SEC Rule 11a-1 promulgated thereunder, as well as various rules of the NYSE,[2] "by engaging in illegal schemes of trading on the NYSE floor while sharing in the profits or losses generated from those trades." *In re N.Y. Stock Exch.*, Exchange Act Release No. 34-41574, 1999 WL 430863, at *2 (June 29, 1999). As part of its investigation, the government examined the trading activities of D'Alessio, who functioned as a floor broker at the NYSE during this time. The investigations focused specifically on D'Alessio's profit-sharing arrangement with The Oakford Corporation (Oakford), a former broker-dealer member of the National Association of Securities Dealers and the American Stock Exchange.

The mechanics of the trading scheme were not complicated: D'Alessio would purchase a particular security on behalf of a customer and thereafter sell that same security at a higher price, resulting in a net gain for the

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[2] Section 11(a) provides, in pertinent part, that "[i]t shall be unlawful for any member of a national securities exchange to effect any transaction on such exchange for its own account, the account of an associated person, or an account with respect to which it or an associated person thereof exercises investment discretion." 15 U.S.C. § 78k(a)(1). Rule 11a-1, which regulates floor trading, provides, in pertinent part, that

> [n]o member of a national securities exchange, while on the floor of such exchange, shall initiate, directly or indirectly, any transaction in any security admitted to trading on such exchange, for any account in which such member has an interest, or for any such account with respect to which such member has discretion as to the time of execution, the choice of security to be bought or sold, the total amount of any security to be bought or sold, or whether any such transaction shall be one of purchase or sale.

17 C.F.R. § 240.11a-1. The NYSE has promulgated similar rules, cited by D'Alessio throughout his complaint, barring these and similar practices. *See* NYSE Rules 90(a); 91; 92(a); 95; 111(a); and 352(c).

customer. D'Alessio received as a commission a percentage of the profits generated on these "flip" trades based on the spread between the bid and ask prices for the securities, typically one-eighth of a point on each share of stock. D'Alessio's exact share was determined by the individual agreements that he maintained with his customers. While there was no guarantee that these "flip" trades would result in a profit, as a floor broker, D'Alessio enjoyed a distinct advantage over other market participants because he had access to information regarding the performance of a particular security and the direction of its share price.

As a result of these activities, in February 1998, the United States Attorney's Office indicted D'Alessio for willfully violating various statutes and regulations that prohibited a floor broker from trading for his own account or for an account in which he exercised investment discretion. The SEC and the NYSE brought parallel charges against D'Alessio arising out of the same conduct. Specifically, the government charged D'Alessio with illegally sharing in the profits generated by trades he executed on the floor of the NYSE on behalf of Oakford.[3] *See D'Alessio*, 125 F.Supp.2d at 657. Although the criminal charges ultimately were dismissed pursuant to a deferred prosecution agreement, the NYSE charges ultimately led to D'Alessio's suspension from the floor of the NYSE, resulting in economic losses to D'Alessio.

In December 1999, D'Alessio, personally, and his company, D'Alessio Securities, Inc., commenced an action against the NYSE in the Supreme Court of New York, New York County, alleging that the NYSE and various senior officials employed by the NYSE con-

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[3] Under his profit sharing agreement with Oakford, D'Alessio received 70% of the trading profits for trades he executed on behalf of the Oakford account.

spired to violate applicable statutory and regulatory prohibitions governing unlawful trading, to wit, section 11(a), Rule 11a-1 and various rules of the NYSE, by "concoct[ing] a phoney interpretation" of these provisions and knowingly disseminating that incorrect interpretation to the detriment of D'Alessio and other floor brokers. D'Alessio contends that he relied on the NYSE's interpretation at the time he engaged in trading practices that were later determined to be illegal. D'Alessio alleges that the NYSE, in an effort to keep its activities secret and curry favor with law enforcement authorities, assisted the United States Attorney's Office and the SEC in their investigation and prosecution of D'Alessio by providing them with "false, misleading and inaccurate information about . . . D'Alessio." D'Alessio further alleges that the NYSE failed to disclose to these authorities that it had "approved and encouraged the practice of flipping," the specific type of unlawful trading for which D'Alessio had been charged. D'Alessio attributes the NYSE's inaction to the substantial fees earned by the NYSE and clearing members on the high volume of "flipped" trades and "a desire to increase the daily volume of trading activity on the NYSE." D'Alessio contends that, as a result of the NYSE's alleged misconduct, he has incurred legal difficulties and has been unable to work as a floor broker on the NYSE.

Based on these and related allegations, D'Alessio brought numerous tort claims against the NYSE and its various officers for injurious falsehood and concealment, fraudulent deceit and concealment, negligent misrepresentation and concealment, and, as to the NYSE only, breach of contract. In connection with these claims, D'Alessio sought compensatory and punitive damages.

On January 13, 2000, the NYSE filed a notice of removal of the action to the United States District Court for the Southern District of New York pursuant to 28

U.S.C. § 1441. Notably, D'Alessio did not challenge removal of the action to federal court at that time or otherwise challenge the district court's jurisdiction over the action. Indeed, the issue of federal jurisdiction was not raised until the district court raised it *sua sponte* in a related case also before the district court.[4] *See Frayler v. N.Y. Stock Exch.*, 118 F.Supp.2d 448 (S.D.N.Y. 2000). Thereafter, the NYSE moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Relying on our decision in *Barbara*, the district court granted the NYSE's motion and dismissed the complaint with prejudice on the ground that the NYSE and its senior officials enjoyed absolute immunity in the performance of regulatory functions delegated to them under the Exchange Act. *See D'Alessio*, 125 F.Supp.2d at 657-59. This appeal followed.

DISCUSSION

The present appeal raises two questions: first, whether the instant action implicates a federal interest sufficient to sustain removal of the action to federal court, and second, "whether employees of the [NYSE] who, pursuant to statutory delegation, perform regulatory functions that would otherwise be performed by the [SEC] are entitled to the same immunities from suit to which comparable [SEC] employees would be entitled." *Id.* at 657. The district court answered both questions in the affirma-

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[4] The district court analyzed the question of federal jurisdiction over D'Alessio's claims in a separate action, *Frayler v. N.Y. Stock Exch.*, 118 F.Supp.2d 448 (S.D.N.Y. 2000), which contained allegations "copied, nearly verbatim" from the complaint filed by D'Alessio. *Id.* at 450. The district court held that removal was proper in *Frayler*, and adopted those reasons as a basis for concluding that it had subject matter jurisdiction over D'Alessio's claims. *See id.* at 451 n.4.

tive. We agree, and therefore affirm the district court's decision.

A. *Standard of Review*

"When reviewing a district court's determination of its subject matter jurisdiction, we review factual findings for clear error and legal conclusions *de novo*." *Phillips* v. *Saratoga Harness Racing*, 240 F.3d 174, 177 (2d Cir. 2001) (quotation marks omitted); *see also Viacom Int'l* v. *Kearney*, 212 F.3d 721, 725-26 (2d Cir.), *cert. denied*, 121 S.Ct. 655 (2000); *cf. Shafii* v. *British Airways, PLC*, 83 F.3d 566, 570 (2d Cir. 1996) ("We review *de novo* a district court's denial of a motion to remand."). We review *de novo* the dismissal of a complaint pursuant to Fed. R. Civ. P. 12(c). *See Burnette* v. *Carothers*, 192 F.3d 52, 56 (2d Cir. 1999), *cert. denied*, 121 S.Ct. 657 (2000). "In deciding a Rule 12(c) motion, we apply the same standard as that applicable to a motion under Rule 12(b)(6), accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party." *Id.*; *see also Sheppard* v. *Beerman*, 94 F.3d 823, 827 (2d Cir. 1996). "We may dismiss the complaint only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Burnette*, 192 F.3d at 56 (quoting *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)).

B. *Whether a Substantial Federal Interest Exists*

Before we address the merits of the NYSE's claim of immunity from suit, we first must consider whether the action was properly removed to federal court.

Pursuant to 28 U.S.C. § 1441(b), a state court defendant may remove a case to federal court "only if the plaintiff's claims could originally have been brought there." *Barbara*, 99 F.3d at 53. Here, the NYSE sought

removal premised on federal question jurisdiction under 28 U.S.C. § 1331 and/or section 27 of the Exchange Act, 15 U.S.C. § 78aa, based on allegations that the NYSE conspired to violate, and encouraged D'Alessio to violate, section 11(a) of the Exchange Act and SEC Rule 11a-1 promulgated thereunder, as well as various rules of the NYSE. "[T]he propriety of the removal in this case thus turns on whether the case falls within the original 'federal question' jurisdiction of the federal courts." *Merrell Dow Pharms.* v. *Thompson*, 478 U.S. 804, 808 (1986) (*Merrell Dow*).

Section 1331 invests in the district court "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." While "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction," *Merrell Dow*, 478 U.S. at 813 (footnote omitted), a case is deemed to "arise under" federal law "where the vindication of a right under state law necessarily turn[s] on some construction of federal law." *Franchise Tax Bd.* v. *Constr. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983) (noting that "[l]eading commentators have suggested that for purposes of § 1331 an action 'arises under' federal law if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law") (internal quotation marks omitted); *T.B. Harms Co.* v. *Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) ("Even though the claim is created by state law, a case may 'arise under' a law of the United States if the complaint discloses a need for determining the meaning or application of such a law."). Federal jurisdiction in these circumstances is predicated on "the presence of a federal issue in a state-created cause of action." *Merrell Dow*, 478 U.S. at 810. Consequently, in cases where "state law creates the cause of action, [we] ask[ ] whether that cause of action poses

a substantial federal question." *W. 14th St. Commercial Corp.* v. *5 W. 14th Owners Corp.*, 815 F.2d 188, 192 (2d Cir. 1987); *see also Merrell Dow*, 478 U.S. at 814 n.12 (noting that commentators have framed the jurisdictional inquiry in these cases as "an evaluation of the *nature* of the federal interest at stake"); *Franchise Tax Bd.*, 463 U.S. at 8 n.8 ("The . . . 'arising under' language [in section 1331] tracks similar language in Art. III, § 2, of the Constitution, which has been construed as permitting Congress to extend federal jurisdiction to any case of which *federal law potentially forms an ingredient.*") (emphasis added) (internal quotation marks omitted).

The determination of whether a claim "arises under" federal law—or, as in the present case, whether removal jurisdiction existed—is "determined by reference to the 'well-pleaded complaint.' " *Merrell Dow*, 478 U.S. at 808; *see also Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987); *Franchise Tax Bd.*, 463 U.S. at 27-28. "[F]ederal jurisdiction must be found from 'what necessarily appears in the plaintiff's statement of his own claim . . . , unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.' " *W. 14th St. Commercial Corp.*, 815 F.2d at 192 (quoting *Taylor* v. *Anderson*, 234 U.S. 74, 75-76, (1914)). After "[e]xamining only those allegations which are properly raised in a well-pleaded complaint, the court must then determine whether the *substance of those allegations* raises a federal question." *Id.* (emphasis added); *cf. Marcus* v. *AT&T Corp.*, 138 F.3d 46, 55 (2d Cir. 1998) ("The artful-pleading doctrine, [a] corollary to the well-pleaded complaint rule, prevents a plaintiff from avoiding removal by framing in terms of state law a complaint the real nature of [which] is federal, regardless of plaintiff's characterization, or by omitting to plead necessary federal questions in a complaint.") (internal quotation marks omitted).

Each of the four causes of action in D'Alessio's state court complaint alleges claims under the common law of the state of New York. This point is undisputed by the parties. D'Alessio argues that a finding that federal jurisdiction is lacking is mandated by our prior decision in *Barbara*, in which we held improper the removal of an action challenging the propriety of internal disciplinary proceedings conducted by the NYSE. In response, the NYSE argues that removal was proper because the federal issues underlying D'Alessio's state law claims are sufficiently substantial to confer federal-question jurisdiction. These federal issues include the interpretation and application of the federal securities laws and the statutory requirement that the NYSE ensure that its members comply with the securities laws and exchange rules, areas of undisputed strong federal interest. Because the parties rely heavily on *Barbara* to support their respective positions, we briefly outline the relevant facts of that case.

In *Barbara*, the SEC initiated an investigation into alleged misconduct by Barbara, a floor clerk at the NYSE, and his employer, Mabon, Nugent Securities. 99 F.3d at 51. After the SEC filed disciplinary charges against Barbara, the NYSE suspended Barbara from working on the floor of the NYSE pending a formal hearing. *Id.* at 52. Barbara petitioned for, and was granted, a stay of the floor ban pending the outcome of his hearing. *Id.* In a subsequent decision, the board of directors of the NYSE reversed all charges brought against Barbara because he was denied adequate discovery. *Id.* Notwithstanding, the NYSE Enforcement Division continued to bar Barbara from working on the NYSE floor, causing him to leave the securities industry. *Id.*

Barbara commenced an action in state court alleging state law claims for, *inter alia*, tortious interference with

contractual relationships, tortious interference with prospective economic advantage, negligent supervision and breach of the covenant of fair dealing within an implied contract. *Id.* The NYSE removed the action to federal court, which Barbara apparently did not challenge. On motion of the NYSE, the district court dismissed Barbara's suit on the ground that he failed to exhaust his administrative remedies. *Id.* at 53. On appeal, we raised the question of subject matter jurisdiction *sua sponte*, and held that Barbara's claims were insufficiently substantial to "arise under" federal law within the meaning of section 1331. Our holding rested primarily on two factors: first, the absence of a private right of action under the applicable federal statute "counsel[ed] against a finding of federal question jurisdiction," *id.* at 54, and second, the claims raised by Barbara in his complaint involved the internal rules of the NYSE, which are contractual in nature, and "thus interpreted pursuant to ordinary principles of contract law, an area in which the federal courts have no special expertise." *Id.* at 55. We nevertheless sustained the district court's subject matter jurisdiction over the action based on Barbara's amended complaint, which alleged violations of federal law. *Id.* at 56.

We find the facts present in this case distinguishable from those in *Barbara*, and conclude that the instant suit implicates a federal interest sufficiently substantial to confer subject matter jurisdiction under section 1331.

In *Barbara*, the plaintiff's claims required the district court to determine whether disciplinary proceedings initiated by the NYSE were consistent with its own internal rules and its contractual obligations to its members. As such, the claims required an examination of the various *internal* rules of the NYSE in accordance with well settled principles of contract interpretation—a task uniquely within the province of state law.

In contrast, here, the federal interest is more substantial because D'Alessio's complaint does not simply challenge the propriety of disciplinary proceedings conducted by the NYSE. D'Alessio concedes this distinction, stating "the Complaint makes no allegations about disciplinary proceedings at all." Rather, an examination of the allegations contained in the complaint establishes that D'Alessio's suit is rooted in violations of federal law, which favors a finding that federal question jurisdiction exists. Specifically, the gravamen of D'Alessio's state law claims is that the NYSE and its officers conspired to violate the federal securities laws and various rules promulgated by the NYSE and failed to perform its statutory duty, *created under federal law*, to enforce its members' compliance with those laws.[5] *See, e.g., Sable* v. *Gen. Motors Corp.*, 90 F.3d 171, 174-75 (6th Cir. 1996) ("arising under" jurisdiction existed where plaintiff's state law tort claim was premised on defendants' breach of a duty created under federal law). Thus, resolution of D'Alessio's claims requires a court to construe federal securities laws and evaluate the scope of the NYSE's duties, as defined under the Exchange Act and the regulations and rules thereto, in enforcing and monitoring a member's compliance with those

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[5] D'Alessio apparently conceded this point below. In characterizing D'Alessio's arguments, the district court stated:

> [D'Alessio] seek[s] to distinguish *Barbara* from the instant lawsuit in several respects. First, [D'Alessio] note[s] that while *Barbara* involved misconduct in connection with disciplinary proceedings, the misconduct alleged in the instant lawsuit also includes improper interpretations of federal securities laws and allegedly duplicitous conduct in connection with providing information about plaintiffs to the [SEC] and the U.S. Attorney's Office.

D'Alessio, 125 F.Supp.2d at 658.

laws.[6] *See, e.g., Sparta Surgical Corp.*, 159 F.3d at 1211 (holding, in an action where plaintiff alleged state common-law claims for, *inter alia*, breach of express and implied contract, breach of the covenant of good faith and fair dealing, gross negligence, intentional misrepresentation, negligent misrepresentation, and interference with economic relations that, "[b]ecause [the] complaint sought relief based upon violation of exchange rules, subject matter jurisdiction was specifically vested in the federal district court under the Exchange Act"); *Marcus*, 138 F.3d at 55-56 (federal jurisdiction proper where plaintiffs' state law breach of warranty claim sought to enforce the terms of tariff agreements between AT&T and its customers created by federal law); *cf. Merrell Dow*, 478 U.S. at 806 ("arising under" juris-

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[6] A cursory examination of the complaint demonstrates that D'Alessio's claims are predicated on alleged breaches of certain duties imposed on the NYSE under the Exchange Act in its capacity as a SRO. Specifically, the allegedly untrue statements made by the NYSE to the government in connection with its investigation into D'Alessio's trading activities form the basis of D'Alessio's injurious falsehood claim. *See, e.g., Squire Records* v. *Vanguard Recording Soc'y*, 25 A.D.2d 190, 192, 268 N.Y.S.2d 251, 254 (1st Dep't 1966), *aff'd*, 19 N.Y.2d 797, 279 N.Y.S.2d 737, 226 N.E.2d 542 (1967). D'Alessio's fraudulent deceit and concealment claim arises out of the NYSE's alleged misinterpretation and purposeful concealment of the federal securities laws and various regulations and rules applicable to D'Alessio's trading activities, which were the basis of the charges brought by the government. The negligent misrepresentation claim is based on allegedly false statements made by the NYSE to D'Alessio in connection with their SRO-member relationship. *See, e.g., Pappas* v. *Harrow Stores*, 140 A.D.2d 501, 504, 528 N.Y.S.2d 404, 407 (2d Dep't 1988) (holding that "some special relationship" between the parties is required to recover under the theory of negligent misrepresentation). Finally, D'Alessio's breach of contract claim against the NYSE only is based on the membership agreement executed by D'Alessio and the NYSE that is required under the Exchange Act for D'Alessio to execute trades on the NYSE floor.

diction did not exist where plaintiffs alleged five common law theories of recovery and a single violation of the Federal Food, Drug, and Cosmetic Act, which violation, if proven, "constitute[d] a rebuttable presumption of negligence" and "directly and proximately caused the injuries suffered by [the plaintiffs' children]") (internal quotation marks omitted); *W. 14th St. Commercial Corp.*, 815 F.2d at 196 (noting that, in *Merrell Dow*, "the federal statute was merely incorporated by reference as a standard of conduct in a state negligence action"). To that end, the complaint is replete with allegations that the NYSE "conspired to violate [the federal securities laws]" and "concocted a phoney interpretation" of these laws and applicable NYSE rules that it knowingly communicated to D'Alessio and other floor brokers to their detriment. Thus, we agree with the district court's conclusion that "the central premise" of D'Alessio's complaint "is that the [NYSE and its various senior officials] violated and purposely encouraged [D'Alessio] and others to violate § 11(a) of the Exchange Act by promulgating erroneous and misleading interpretations of that statutory provision." *Frayler*, 118 F.Supp.2d at 450.

This determination compels our resolution of the question of jurisdiction: because the NYSE's alleged violations of the federal securities laws and its improper interpretation of those laws underlie D'Alessio's state law claims, the federal issue is substantial. "[U]pon [the federal statute's] construction the vindication of rights and definition of relationships *created by federal law* depends." *W. 14th St. Commercial Corp.*, 815 F.2d at 193, 196 ("arising under" jurisdiction established where plaintiff's state law claims "encompass a substantial federal question under the Condominium and Cooperative Abuse Relief Act"); *see also Caterpillar Inc.*, 482 U.S. at 395 (federal question jurisdiction did not lie under section 301 of the Labor Management Relations Act

where the resolution of the plaintiffs' breach of an individual employment contract claims "[did] not substantially depend[ ] upon interpretation of the collective-bargaining agreement"); *Sparta Surgical Corp.*, 159 F.3d at 1212 ("[A]lthough [plaintiff's] theories are posited as state law claims, they are founded on the defendants' conduct in suspending trading and de-listing the offering, the propriety of which must be exclusively determined by federal law."). Accordingly, we conclude that the "federal ingredient" in the present action is far more significant than the federal interest present in *Barbara. W. 14th St. Commercial Corp.*, 815 F.2d at 196.

Our conclusion in favor of federal jurisdiction is bolstered by allegations in the complaint of malfeasance on the part of the NYSE in the performance of its general oversight function. Specifically, D'Alessio alleges that the NYSE failed to satisfy its "duty to its members to abide by and enforce its rules, and to accurately advise its members with respect to the securities laws and regulations and its own rules." This duty is imposed on the NYSE by sections 19(g) and 19(h) of the Exchange Act, *see* 15 U.S.C. §§ 78s(g), (h); *In re N.Y. Stock Exch.*, 1999 WL 430863, at *3 ("The NYSE has an affirmative obligation to be vigilant in surveilling for, evaluating, and effectively addressing activity that could involve violations of [the Exchange Act, the rules and regulations thereunder, and the rules of the NYSE]."), and was the focus of SEC administrative proceedings, which examined whether the NYSE undertook adequate procedures "for the purpose of detecting securities law violations and enforcing compliance by its members." *In re N.Y. Stock Exch.*, 1999 WL 430863, at *2.

While D'Alessio's claims are cast as state law claims, they are premised, in large part, on the NYSE's failure to enforce and monitor compliance by its members with the Exchange Act and the rules and regulations thereunder,

as well as the rules promulgated by the NYSE pursuant to the Exchange Act. *See id.* at *1 ("Exchanges violate Section 19(g) when they fail to be vigilant in surveilling for, evaluating, and effectively addressing issues that could involve violations of the securities laws.") (internal quotation marks omitted). The source of the duty imposed on the NYSE (as well as other SROs) is found in *federal* law; namely, in the Exchange Act. Thus, it is the propriety of the NYSE's actions, as prescribed under federal law, that is at the heart of D'Alessio's allegations. Moreover, resolution of D'Alessio's claims necessarily requires an inquiry into whether the NYSE satisfactorily performed its duty in identifying potential violations of the federal securities laws and assisting in any criminal or civil investigation arising from a member's noncompliance with those laws, both areas of strong federal interest. *See, e.g., Barbara*, 99 F.3d at 59; *Spear, Leeds & Kellogg* v. *Cent. Life Assurance Co.*, 85 F.3d 21, 25 (2d Cir. 1996); *Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1504 (11th Cir. 1986) ("The comprehensive scheme of statutes and regulations designed to police the securities industry is indicative of a strong federal interest."); *Frayler*, 118 F.Supp.2d at 451 ("[T]he question of whether the [NYSE] properly interpreted § 11(a) of the Exchange Act is wholly a matter of federal law and, indeed, a matter of intense federal concern given the importance of federal regulation of the stock market."). In recognition of that interest, section 27 of the Exchange Act vests in federal courts exclusive jurisdiction over claims alleging violations of the securities laws and actions "brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder." 15 U.S.C. § 78aa. In sum, because D'Alessio's claims necessarily require a court to construe both the federal law governing securities trading on a national exchange *and* the

NYSE's role, as defined under federal law, in enforcing and monitoring a member's compliance with those laws, we conclude that the federal interest underlying D'Alessio's claims is sufficiently substantial to "arise under" federal law within the meaning of section 1331.

C. *Whether the NYSE and its Officials Enjoy Absolute Immunity From Suit*

Having determined that removal was proper, we proceed to the second inquiry: whether the NYSE and its officers possess absolute immunity with respect to D'Alessio's claims. Because the facts relevant to the question of immunity are undisputed and clearly set forth in the record, we decide that question as a matter of law, based on the allegations contained in the complaint. *See Austin Mun. Sec.* v. *Nat'l Ass'n of Sec. Dealers*, 757 F.2d 676, 685 (5th Cir. 1985). As the party seeking immunity from personal liability for its actions, the NYSE bears the burden of establishing that it is entitled to immunity from suit. *See Butz* v. *Economou*, 438 U.S. 478, 506 (1978).

The NYSE argues that it is absolutely immune from suit because the allegations in the complaint are predicated on the NYSE's improper performance of the regulatory functions delegated by the SEC to the NYSE pursuant to the Exchange Act. In response, D'Alessio argues that the district court's dismissal of the complaint on absolute immunity grounds was based on an "erroneous expansion" of our decision in *Barbara*, which accorded the NYSE immunity from suit in a case involving alleged misconduct in connection with internal disciplinary proceedings. Specifically, D'Alessio argues that, unlike *Barbara*, "the misconduct alleged in the instant lawsuit also includes improper interpretations of federal securities laws and allegedly duplicitous conduct in connection with providing information about plaintiffs

to the [SEC] and the U.S. Attorney's Office." *D'Alessio*, 125 F.Supp.2d at 658. Relying on our prior decision in *Barbara*, the district court rejected D'Alessio's position and held that "the interpretive and referral functions of the [NYSE] are just as quasi-governmental as its disciplinary functions, and hence the same immunities attach." *Id.* We agree with the district court's reasoning on this point, and affirm its determination that the NYSE is immune from liability for claims arising out of the discharge of its duties under the Exchange Act.

As in our resolution of the jurisdiction question, we begin with the specific facts and holding in *Barbara*. In *Barbara*, we upheld the district court's decision according absolute immunity to the NYSE for "claims arising out of the performance of its federally-mandated conduct of disciplinary proceedings." 99 F.3d at 58. Although our decision was based on alleged misconduct in connection with disciplinary proceedings, we held that the entitlement of a government official to immunity from suit should be decided on a case-by-case basis, "depend[ing] upon the nature of the governmental function being performed." *Id.* ("[I]mmunity doctrines protect private actors when they perform important governmental functions."). Consistent with that approach, we recognized that "courts have not hesitated to extend the doctrine of absolute immunity to private entities engaged in *quasi-public adjudicatory and prosecutorial duties*." *Id.* (emphasis added); *see also Sparta Surgical Corp.*, 159 F.3d at 1214 (affirming dismissal of suit against the NASD for improperly de-listing and suspending trading in a stock on the NASDAQ stock market on immunity grounds); *Austin Mun. Sec.*, 757 F.2d at 689 (holding that NASD disciplinary officers are "entitled to absolute immunity from further prosecution for civil liability for their actions taken within the outer scope of their official duties"); *cf. Harms* v. *Riordan-Bellizi*, 223 A.D.2d 624,

625, 636 N.Y.S.2d 839, 840 (2d Dep't 1996) ("[T]he decision of the hearing officer, rendered after a hearing, was quasi-judicial in nature, and therefore is clothed with absolute immunity from claims sounding in defamation or injurious falsehood."). We further held that "absolute immunity is particularly appropriate in the unique context of the self-regulation of the national securities exchanges," where the NYSE "performs a *variety of regulatory functions* that would, in other circumstances, be performed by [the SEC]." *Barbara*, 99 F.3d at 59 (emphasis added); *see also Sparta Surgical Corp.*, 159 F.3d at 1214 ("[S]elf-regulatory organizations do not enjoy complete immunity from suits; it is only when they are acting under the aegis of the Exchange Act's delegated authority that they so qualify."). Thus, although the immunity inquiry in *Barbara* was confined to the NYSE's conduct in connection with disciplinary proceedings, *Barbara* stood for the broader proposition that an SRO, such as the NYSE, may be entitled to immunity from suit for conduct falling within the scope of the SRO's regulatory and general oversight functions. *See Barbara*, 99 F.3d at 59; *Austin Mun. Sec.*, 757 F.2d at 681 (describing the self-regulatory power of the NASD as "broad"). Accordingly, we reject D'Alessio's attempts to limit our application of the doctrine of absolute immunity to cases involving misconduct in connection with disciplinary proceedings and excluding activities of the NYSE, as an SRO, in performing quasi-governmental functions pursuant to the broad authority delegated to it by the Exchange Act.

The NYSE, as an SRO, stands in the shoes of the SEC in interpreting the securities laws for its members and in monitoring compliance with those laws. It follows that the NYSE should be entitled to the same immunity enjoyed by the SEC when it is performing functions delegated to it under the SEC's broad oversight authority.

See Sparta Surgical Corp., 159 F.3d at 1213 ("Extending immunity when a self-regulatory organization is exercising quasi-governmental powers is consistent with the structure of the securities market as constructed by Congress."); *Austin Mun. Sec.*, 757 F.2d at 690-91 ("[The] NASD disciplinary officers serve as surrogates for the SEC, and should receive the same immunity their principles [sic] possess."); *D'Alessio*, 125 F.Supp.2d at 658 (holding that according the NYSE absolute immunity when it performs regulatory functions that would otherwise be performed by the SEC "is a matter not simply of logic but of intense practicality, since, in the absence of such immunity, the [NYSE's] exercise of its quasi-governmental functions would be unduly hampered by disruptive and recriminatory lawsuits").

In determining whether the NYSE is entitled to absolute immunity from suit in the present case, we look not at the manner in which D'Alessio casts his claims against the NYSE (*i.e.*, tort or contract), but rather to the alleged misconduct of the NYSE as detailed in the complaint. D'Alessio's claims are predicated on the NYSE's improper performance of its interpretive, enforcement and referral functions. Specifically, D'Alessio alleges that the NYSE incorrectly interpreted and applied section 11(a) of the Exchange Act and regulations and rules thereto (interpretive function); that the NYSE failed to monitor D'Alessio's compliance with the Exchange Act and various rules of the NYSE, and advise him that the commissions he earned in connection with "flip" trades violated those laws (enforcement function); and that the NYSE provided false information when it cooperated with and assisted the United States Attorney's Office and the SEC in their investigations into alleged violations of section 11(a) by D'Alessio and other floor brokers (referral function). The district court concluded that the NYSE's actions fell "well within the perimeter of the

[NYSE's] quasi-governmental duties" because they "relate to the [NYSE's] development and promulgation of interpretations of statutory and regulatory requirements, the dissemination and implementation of these interpretations, and the provision of information to government agencies." *D'Alessio*, 125 F.Supp.2d at 658. After reviewing the complaint, we agree with the district court's determination that the NYSE's alleged misconduct falls within the scope of quasi-governmental powers delegated to the NYSE pursuant to the Exchange Act and, therefore, conclude that absolute immunity precludes D'Alessio from recovering money damages in connection with his claims.

The NYSE's alleged improper interpretation of the type of conduct prohibited under section 11(a) falls within the NYSE's "quasi-public adjudicatory" duties. Similarly, the NYSE acted in its adjudicatory capacity when it determined that D'Alessio was guilty of violating section 11(a) and various rules of the NYSE and suspended him from further trading on the NYSE floor. Because these actions "share the characteristics of the judicial process," *Barbara*, 99 F.3d at 59 (quotation marks omitted), the NYSE is entitled to immunity from suit for claims based on these actions. In charging D'Alessio with misconduct and referring his case to the United States Attorney's Office and the SEC, the NYSE exercised its authority pursuant to its "quasi-prosecutorial" function. Finally, any malfeasance on the part of the NYSE in failing to monitor D'Alessio's and other floor brokers' compliance with the prohibition under section 11(a) plainly falls within the scope of the quasi-governmental duties delegated to the NYSE under the Exchange Act. Notwithstanding the distinct nature of these duties, the misconduct that the NYSE allegedly engaged in share a common theme: they all relate to "proper functioning of the regulatory system," *Austin*

Mun. Sec., 757 F.2d at 687. Accordingly, consistent with *Barbara*, we hold that the NYSE, when acting in its capacity as a SRO, is entitled to immunity from suit when it engages in conduct consistent with the quasi-governmental powers delegated to it pursuant to the Exchange Act and the regulations and rules promulgated thereunder. *See Barbara*, 99 F.3d at 59; *see also P'ship Exch. Sec. Co.* v. *Nat'l Ass'n of Sec. Dealers*, 169 F.3d 606, 608 (9th Cir. 1999); *Sparta Surgical Corp.*, 159 F.3d at 1214. Therefore, the district court correctly determined that the NYSE and its various officers were entitled to absolute immunity for the claims brought by D'Alessio.

CONCLUSION

For the foregoing reasons, we affirm the district court's grant of judgment on the pleadings in favor of the NYSE and its various officers. The parties shall bear their own costs on this appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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00 Civ. 269 (JSR)

JOHN R. D'ALESSIO and
D'ALESSIO SECURITIES, INC.,

Plaintiffs,

—v.—

NEW YORK STOCK EXCHANGE, INC., RICHARD A. GRASSO, EDWARD A. KWALWASSER, and ROBERT J. MCSWEENEY,

Defendants.

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

The basic question presented by defendants' pending motion to dismiss is whether employees of the New York Stock Exchange who, pursuant to statutory delegation, perform regulatory functions that would otherwise be performed by the Securities and Exchange Commission are entitled to the same immunities from suit to which comparable Commission employees would be entitled. The short answer is yes.

The pertinent facts are as follows. Plaintiff John R. D'Alessio, formerly a "floor broker" on the New York Stock Exchange (the "Exchange"), was indicted in 1998 for willfully violating various statutory prohibitions on a floor broker's trading for his own account or for an account in which he exercises investment discretion, see 15 U.S.C. §§ 78k & 78ff; *see also United States v. Oakford Corp.*, No. 98 Cr. 144, 1999 WL 1201725 (S.D.N.Y. Dec. 13, 1999). Parallel charges were brought against D'Alessio and his company, D'Alessio Securities Inc., by the United States Securities and Exchange Commission (the "Commission") and also by the Exchange. While the criminal charges were ultimately dismissed pursuant to a deferred prosecution agreement, and while the Commission charges remain unresolved, the Exchange charges ultimately led to D'Alessio's being barred from the floor of the Exchange, with consequent economic loss to D'Alessio and his company. *See* Complaint ¶ 82.

Plaintiffs then commenced the instant action against the Exchange and various officials thereof, alleging that the unlawful trading that led to D'Alessio's indictment, disbarment, and other legal troubles was itself the unwitting result of the defendants' dissemination of a knowingly incorrect interpretation of the applicable statutory and regulatory prohibitions and of the defendants' knowing but secret encouragement of the very kind of unlawful trading for which plaintiffs were disciplined. Plaintiffs further complained that the defendants fraudulently concealed these facts from the Commission and the United States Attorney's Office, while actively conniving in plaintiffs' being charged. Based on these and related allegations, plaintiffs brought claims of injurious falsehood, fraudulent deceit and concealment, negligent misrepresentation, and, as to the Exchange, breach of contract.

Defendant's then moved for judgment on the pleadings on several grounds, only one of which the Court need now reach: defendants' claim of immunity from suit. The issue is largely determined by the Second Circuit's decision in *Barbara v. New York Stock Exchange*, 99 F.3d 49 (2d Cir. 1996), which accorded absolute immunity to the Exchange from a suit for damages arising from the allegedly unlawful conduct of an Exchange disciplinary proceeding. Among other rationales, *Barbara* relied on the fact that, under the federal securities laws, the Exchange "performs a variety of regulatory functions that would, in other circumstances, be performed by a government agency," namely, the Commission. *Barbara*, 99 F.3d at 59. *Mutatis mutandis*, the Exchange and its employees, in performing these functions, should be accorded the same absolute immunity that would be afforded the Commission and its employees in parallel circumstances. *See Austin Mun. Sec., Inc. v. National Ass'n of Sec. Dealers*, 757 F.2d 676, 688 (5th Cir. 1985) (extending absolute immunity to another national securities exchange and its employees). This is a matter not simply of logic but of intense practicality, since, in the absence of such immunity, the Exchange's exercise of its quasi-governmental functions would be unduly hampered by disruptive and recriminatory lawsuits. *See Barbara*, 99 F.3d at 59; *Austin*, 757 F.2d at 688.

Plaintiffs seek to distinguish *Barbara* from the instant lawsuit in several respects. First, they note that while *Barbara* involved misconduct in connection with disciplinary proceedings, the misconduct alleged in the instant lawsuit also includes improper interpretations of federal securities laws and allegedly duplicitous conduct in connection with providing information about plaintiffs to the Commissioner and the U.S. Attorney's Office. But the interpretive and referral functions of the Exchange are just as quasi-governmental as its disciplinary func-

tions, and hence the same immunities attach. *See, e.g., Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1214-15 (9th Cir. 1998).

Second, they argue that even if the Exchange itself is entitled to absolute immunity, its officers are entitled only to qualified immunity, the bounds of which were here exceeded. But "certain public functions require a greater degree of protection than qualified immunity can provide," *Barbara*, 99 F.3d at 58, and this is equally as true of the Exchange officials' interpretive and referral functions as of their disciplinary functions. To prevent the placing of endless obstacles in path of the effective fulfillment of such functions, Exchange employees are therefore entitled to absolute immunity for any actions that are within the "outer perimeter" of the performance of such functions. *McManus v. McCarthy*, 586 F. Supp. 302, 304 (S.D.N.Y. 1984), *quoting Barr v. Matteo*, 360 U.S. 564, 575 (1959); *see Austin*, 757 F.2d at 689; *Mandelbaum v. New York Mercantile Exchange*, 894 F. Supp. 676, 679-80 (S.D.N.Y. 1995); *Friedman v. Young*, 702 F. Supp. 433, 435 (S.D. N.Y. 1988) .

Nor may a litigant avoid the bar of this immunity simply by making allegations of bad faith, conspiracy, or malice. *See, e.g., In re Olick*, No. 99-cv-5128, 2000 WL 354191 (E.D. Pa. Apr. 4, 2000); *Partnership Exch. Sec. Co. v. National Assn of Sec. Dealers, Inc.*, No. C-96-2792, 1997 WL 448164, at *5 (N.D. Cal. July 3, 1997); *Gugliaro v. New York Coffee, Sugar, & Cocoa Exch., Inc.*, No. 96 Civ. 4942, 1997 WL 109442, at *3 (S.D.N.Y. Mar. 11, 1997). The doctrine that acts outside the scope of an official's authority are ineligible for absolute immunity is reserved for those acts that fall outside the official's authority categorically rather than by the specifics of their performance. *See, e.g., Burns v. Reed*, 500 U.S. 478, 492-96 (1991). The allegations at issue here, however, relate to the defendants' develop-

ment and promulgation of interpretations of statutory and regulatory requirements, the dissemination and implementation of these interpretations, and the provision of information to government agencies, all of which are categories of action well within the perimeter of the defendants' quasi-governmental duties.

Finally, plaintiffs argue that *Barbara* should be narrowly construed because it is in tension with the Second Circuit's decision in *United States v. Solomon*, 509 F.2d 863 (2d Cir. 1975), in which the Court of Appeals held the Fifth Amendment privilege against self-incrimination inapplicable to the Exchange's questioning of representatives of a member firm who were under investigation for violating certain record-keeping requirements that were separately mandated by both Commission regulations and Exchange rules. In *Solomon*, Judge Friendly, in a typically erudite opinion, recounted the Exchange's long history of "private" self-regulation antedating the enactment of the federal securities laws, and held that the Fifth Amendment—most of the provisions of which "are incapable of violation by anyone except government in the narrowest sense," *id.* at 867—did not apply to disciplinary activities designed to protect the Exchange's own private regulatory interests, even if the conduct under investigation also violated federal law. *See id.* at 869.

Thus, while some of the broader dicta in *Solomon* are not easily reconciled with some of the statements in *Barbara*, what *Solomon* sought to emphasize was the distinction between the Exchange's quasi-governmental duties and its private functions. The distinction is easily seen, for example, in the recent case of *Desiderio v. National Ass'n of Sec. Dealers*, Inc., 191 F.3d 198, 206 (2d Cir. 1999), where the Court of Appeals, citing *Solomon*, found that there was no "state action" in the enforcement by a national securities exchange of its

internal requirement that brokers sign a mandatory arbitration clause. Other cases may present closer calls, but this case is not one of them: for even though plaintiffs allege that the motivation for the alleged misconduct arose from the Exchange's private interests, the misconduct itself related to the exercise, properly or improperly, of the Exchange's public functions. Accordingly, it is *Barbara*, not *Solomon*, that is relevant here.

For the foregoing reasons, defendants' motion for judgment on the pleadings is granted, and the Complaint is dismissed with prejudice. Clerk to enter judgment.

SO ORDERED.

/s/ JED S. RAKOFF
JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
September 29, 2000

No. 01-590

SUPREME COURT, U.S.
FILED
NOV 9 2001

IN THE

Supreme Court of the United States

JOHN R. D'ALESSIO and D'ALESSIO SECURITIES, INC.,

Petitioners,

—v.—

NEW YORK STOCK EXCHANGE, INC., RICHARD A. GRASSO, EDWARD A. KWALWASSER and ROBERT J. MCSWEENEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS NEW YORK STOCK EXCHANGE, INC., RICHARD A. GRASSO, EDWARD A. KWALWASSER AND ROBERT J. MCSWEENEY IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether, as the Court of Appeals for the Second Circuit found, the district court had jurisdiction over petitioners' action?

2. Whether the Second Circuit properly held that respondents are entitled to absolute immunity from suits for damages arising out of respondents' allegedly improper exercise of their quasi-governmental duties under the federal securities laws?

PARTIES TO THE PROCEEDING

Respondent the New York Stock Exchange, Inc. (the "NYSE") is a New York not-for-profit corporation. The NYSE has no parent corporations and does not have any issued stock.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents the New York Stock Exchange, Inc. (the "NYSE"), Richard A. Grasso, Edward A. Kwalwasser and Robert J. McSweeney (collectively, the "Respondents") respectfully submit this opposition to the petition for a writ of certiorari (the "Petition," cited herein as "Pet.") of John R. D'Alessio and D'Alessio Securities, Inc. (collectively, "Petitioners"), seeking review of a judgment of the United States Court of Appeals for the Second Circuit, which held that the district court had jurisdiction to adjudicate Petitioners' claims and affirmed the dismissal of those claims on the ground that the Respondents are absolutely immune from suits for damages arising out of Respondents' allegedly improper exercise of quasi-governmental duties delegated to the NYSE under the federal securities laws.

STATEMENT OF THE CASE

The Petition presents two straightforward questions, neither of which warrants review by this Court. The first question is whether, as the Court of Appeals for the Second Circuit found, the district court had jurisdiction over Petitioners' action. The Second Circuit properly concluded that the district court had jurisdiction to adjudicate Petitioners' claims because resolution of those claims (if Respondents were not entitled to absolute immunity) would require the construction and interpretation of Sections 11(a), 15 U.S.C. § 78k(a) (Appendix for Respondents ("Resp. App.") at 14a-17a), and 19(g), 15 U.S.C. § 78s(g) (Resp. App. at 18a), of the Securities Exchange Act of 1934 (the "Exchange Act"), thereby presenting a substantial federal question. Contrary to Petitioners' assertions, the Second Circuit's decision is completely consistent with this Court's decisions in *Merrell Dow*

Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986), and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). There is no conflict among the circuits on this issue. The only circuit court to have considered the jurisdictional issue on virtually identical facts reached the same conclusion as the Second Circuit. *See Sparta Surgical Corp. v. National Ass'n of Secs. Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998).

The second question is whether the Second Circuit properly held that Respondents are entitled to absolute immunity from suits for damages based upon the conduct Petitioners alleged in their complaint. The Second Circuit properly held that Respondents are entitled to absolute immunity because all of Petitioners' claims are based upon Respondents' allegedly improper performance of the quasi-governmental duties delegated to the NYSE by Congress under the Exchange Act. The Second Circuit's holding is completely consistent with applicable Supreme Court precedent, *see, e.g., Barr v. Matteo*, 360 U.S. 564 (1959), and all circuit courts to have considered the issue are in agreement. *Cf. Partnership Exch. Secs. Co. v. National Ass'n of Secs. Dealers, Inc.*, 169 F.3d 606 (9th Cir. 1999); *Sparta Surgical Corp.*, 159 F.3d 1209; *Austin Mun. Secs., Inc. v. National Ass'n of Secs. Dealers, Inc.*, 757 F.2d 676 (5th Cir. 1985).

Factual Background

The Parties. Respondent NYSE is a New York not-for-profit corporation, registered with the Securities and Exchange Commission ("SEC") as a national securities exchange pursuant to Section 6 of the Exchange Act, 15 U.S.C. § 78f (Resp. App. at 2a-14a), and is a self-regulatory organization ("SRO") within the meaning of the Exchange Act. 15 U.S.C. § 78c(a)(26) (Resp. App. at 1a). *See D'Alessio v. New York Stock Exch., Inc.*, 258

F.3d 93, 96 (2d Cir. 2001) (Appendix for Petitioners ("Pet. App.") at 3a-4a); *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49, 51 (2d Cir. 1996). Pursuant to Section 19(g)(1) of the Exchange Act, the NYSE must "comply with the provisions of [the Exchange Act], the rules and regulations thereunder, and its own rules, and . . . absent reasonable justification or excuse enforce compliance" with these provisions by its members and associated persons. 15 U.S.C. § 78s(g)(1) (Resp. App. at 18a). The SEC has broad and exclusive authority, pursuant to Section 19(h)(1), to take remedial action against both the NYSE and its officials for failure to comply with the obligations imposed by Section 19(g). 15 U.S.C. § 78s(h)(1) (Resp. App. at 19a); *D'Alessio*, 258 F.3d at 96 (Pet. App. at 4a).

Respondents Richard A. Grasso, Edward A. Kwalwasser and Robert J. McSweeney were, at all relevant times, senior officers of the NYSE. Pet. App. at 2a. Petitioner John R. D'Alessio ("D'Alessio") was a member of the NYSE and conducted business as an independent floor broker through his wholly owned corporation, petitioner D'Alessio Securities, Inc. ("DSI"), which was a member organization of the NYSE. *D'Alessio*, 258 F.3d at 95, 96 (Pet. App. at 2a, 5a).

Factual Allegations Underlying the Complaint. In late 1997, the United States Attorney's Office for the Southern District of New York ("USAO") contacted the NYSE in connection with an ongoing investigation into possible violations of Section 11(a) of the Exchange Act and SEC Rule 11a-1, 17 C.F.R. 240.11a-1 (Resp. App. at 22a-23a) by certain independent floor broker members of the NYSE, including Petitioners, and certain non-members. *D'Alessio*, 258 F.3d at 96-97 (Pet. App. at 4a-5a) (citing *In re New York Stock Exch., Inc.*, Exchange Act Release No. 34-41574, 1999 WL 430863, at *2 (June 29, 1999)). The NYSE assisted the USAO, and later the SEC, with their investigation and prosecution of

Petitioners and others. *In re New York Stock Exch., Inc.*, 1999 WL 430863, at *6.

Both D'Alessio and DSI were sued civilly by the SEC for violations of Section 11(a).[1] D'Alessio, along with seven other NYSE members, was indicted for criminal violations of the same statute. *D'Alessio*, 258 F.3d at 97 (Pet. App. at 6a). Subsequently, pursuant to its oversight authority under Section 19(h) of the Exchange Act, the SEC commenced an investigation into the NYSE's surveillance of independent floor brokers for violations of Section 11(a) and related rules. On June 29, 1999, the SEC simultaneously commenced and settled administrative proceedings against the NYSE for failing adequately to enforce compliance with Section 11(a), Rule 11a-1 and related NYSE Rules. *In re New York Stock Exch., Inc.*, 1999 WL 430863.

In December 1999, the criminal indictment against D'Alessio was dismissed pursuant to a deferred prosecution agreement. *D'Alessio*, 258 F.3d at 97 (Pet. App. at 6a).[2] While acknowledging that their trading activities violated Section 11(a), Petitioners sued Respondents, alleging that their illegal trading had been the "unwitting" result of (1) the NYSE's alleged failure to advise NYSE members that such conduct was illegal, despite an affirmative duty to do so; and (2) deliberate efforts by

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[1] On May 2, 2001, the SEC settled its action against Petitioners by consent judgment. *See Securities and Exch. Comm'n v. Oakford Corp.*, Litigation Release No. 16,184, 2001 WL 460737 (May 2, 2001). As part of the settlement, Petitioners were permanently enjoined from violating Section 11(a) and Rule 11a-1, among other provisions of the federal securities laws, and D'Alessio consented to pay $200,000 in disgorgement and prejudgment interest. *Id.* at *1.

[2] All of the other NYSE members indicted with D'Alessio ultimately pleaded guilty to criminal charges relating to violations of Section 11(a). *In re New York Stock Exch., Inc.*, 1999 WL 430863, at *4 & n.8.

the NYSE to encourage independent floor brokers to violate Section 11(a). *D'Alessio*, 258 F.3d at 97-98, 103 (Pet. App. at 6a-7a, 14a).

Procedural History

Petitioners commenced this action in the Supreme Court of the State of New York, New York County, on December 14, 1999. *D'Alessio*, 258 F.3d at 97 (Pet. App. at 6a). Their complaint purported to allege state law causes of action for injurious falsehood and concealment, fraudulent deceit and concealment, negligent misrepresentation and concealment, and breach of contract against Respondents. *Id.* at 98 (Pet. App. at 7a). Each of these claims was predicated upon allegations that Respondents had (1) engaged in a conspiracy to violate, and cause others to violate, Section 11(a); and (2) breached an alleged duty to advise NYSE members of the correct interpretation of Section 11(a). *Id.* at 97-98, 103 (Pet. App. at 6a-7a, 14a). On January 13, 2000, Respondents timely removed the action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1441 (Resp. App. at 21a-22a). *Id.* at 98 (Pet. App. at 7a-8a). Petitioners did not seek remand of the case or otherwise challenge the jurisdiction of the district court. *Id.* (Pet. App. at 8a). Respondents moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), and on September 29, 2000, the district court dismissed the complaint, finding that in " 'perform[ing] . . . regulatory functions that would, in other circumstances, be performed by a government agency,' namely the [SEC,]" the NYSE and its officials "should be accorded the same absolute immunity that would be afforded the [SEC] and its employees in parallel circumstances." *D'Alessio v. New York Stock Exch., Inc.*, 125 F. Supp. 2d 656, 658 (S.D.N.Y. 2000) (Pet. App.

at 27a) (quoting *Barbara v. New York Stock Exch., Inc.*, 99 F.3d 49, 59 (2d Cir. 1996)). On October 17, 2000, Petitioners appealed the district court's decision to the United States Court of Appeals for the Second Circuit.

Although Petitioners had never challenged the removal of the complaint in this action, on October 27, 2000, the district court addressed the issue of its jurisdiction over Petitioners' action in its Opinion and Order denying a motion to remand the related case of *Frayler v. New York Stock Exch., Inc.*, 118 F. Supp. 2d 448 (S.D.N.Y. 2000). Because the *Frayler* complaint was virtually identical to the complaint in this action,[3] the District Court *sua sponte* examined the basis of its jurisdiction in this case, even though Petitioners had never challenged removal, and concluded that removal of this case had been proper. *Id.* at 451 n.4.

Decision Below. On July 19, 2001, a unanimous panel of the United States Court of Appeals for the Second Circuit (Meskill, Kearse, and Squatrito, JJ.[4]) affirmed the judgment of the district court in its entirety.

First, applying this Court's precedents in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), the Second Circuit found that Petitioners' claims, though asserted as state law causes of action, posed a substantial federal question for two reasons. The court held that Petitioners' allegations that Respondents conspired to violate Section 11(a) and Rule 11a-1 required the court to construe the federal

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[3] *See Frayler*, 118 F. Supp. 2d at 450 ("The complaint was copied, nearly verbatim, from a civil complaint drafted by counsel for [Petitioners], which had previously been removed from the New York State courts . . . .").

[4] Hon. Dominic J. Squatrito, United States District Judge for the District of Connecticut, sitting by designation.

securities laws, and that Petitioners' claims would also require a court to evaluate the scope of the NYSE's regulatory duties "*created under federal law*, to enforce [NYSE] members' compliance with those laws." *D'Alessio*, 258 F.3d at 101 (Pet. App. at 14a) (emphasis in original).

The Second Circuit then addressed the issue of whether the Respondents were entitled to absolute immunity from damage claims based on the conduct alleged. The Second Circuit rejected Petitioners' argument that its prior decision in *Barbara* had limited the "application of the doctrine of absolute immunity to cases involving misconduct in connection with disciplinary proceedings . . . ." *D'Alessio*, 258 F.3d at 105 (Pet. App. at 21a). The court held that Respondents were entitled to absolute immunity in the instant case because they were performing "quasi-governmental functions pursuant to the broad authority delegated to [them] by the Exchange Act." *Id.* at 106 (Pet. App. at 23a). The court concluded that because Respondents were "stand[ing] in the shoes of the SEC in interpreting the securities laws for [NYSE] members and . . . monitoring compliance with those laws . . . they should be entitled to the same immunity enjoyed by the SEC when it is performing functions delegated to it under the SEC's broad oversight authority." *Id.* at 105 (Pet. App. at 21a) (citations omitted).

REASONS FOR DENYING THE PETITION

Petitioners have not even attempted to demonstrate a "compelling reason" for this Court to grant a writ of certiorari, *see* SUP. CT. R. 10, and no such reason exists. The Second Circuit's decision does not conflict with a decision of any other Court of Appeals, nor is it in conflict with a decision by a state court of last resort.

Furthermore, the Second Circuit's decision is in harmony with this Court's precedent on the two issues on which Petitioners seek review.

On the issue of whether the district court had jurisdiction over Petitioners' action, the Second Circuit's decision is fully consistent with this Court's precedent on the issue, specifically *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). Those decisions recognized, as the Second Circuit did here, the well-settled principle that federal question jurisdiction exists where a plaintiff's claims, though couched as state law causes of action, require the construction and interpretation of federal law and the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law.

On the issue of absolute immunity, the Second Circuit's holding that the NYSE and its officials are absolutely immune from suits arising out of the performance of federally mandated regulatory functions is fully consistent with Supreme Court precedent granting governmental officials absolute immunity from non-constitutional claims arising out of alleged conduct "within the outer perimeter" of their official authority. *E.g.*, *Barr v. Matteo*, 360 U.S. 564 (1959).

I. The Second Circuit Properly Held That the District Court Had Jurisdiction to Adjudicate This Case

Article III of the Constitution vests the power to adjudicate all cases "arising under [the] Constitution [and] the Laws of the United States" in the federal judiciary. U.S. CONST. art. III, § 2, cl. 1 (Resp. App. at 1a). Through 28 U.S.C. § 1331 (Resp. App. at 20a), Congress provided that "[t]he district courts shall have original jurisdiction

of all civil actions arising under the Constitution, laws, or treaties of the United States." In addition, the federal courts have exclusive jurisdiction, pursuant to Section 27 of the Exchange Act, over "violations of [the exchange Act] or the rules or regulations thereunder, and all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules or regulations thereunder." 15 U.S.C. § 78aa (Resp. App. at 20a).

A case is "deemed to 'arise under' federal law 'where the vindication of a right under state law necessarily turn[s] on some construction of federal law.' " *D'Alessio*, 258 F.3d at 99 (Pet. App. at 10a) (quoting *Franchise Tax Bd.*, 463 U.S. at 9) (internal citation omitted). In such cases, "[f]ederal jurisdiction . . . is predicated on 'the presence of a federal issue in a state-created cause of action.' " *Id.* (Pet. App. at 10a) (quoting *Merrell Dow*, 478 U.S. at 810). The Second Circuit correctly found that Petitioners' state-created causes of action posed "a substantial federal question." *Id.* (Pet. App. at 10a-11a) (citing *West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188, 192 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987)).

A. Petitioners' Allegations of Violations of Section 11(a) Provide a Basis for Federal Jurisdiction

Despite Petitioners' attempt to frame their claims in common law terms, the Second Circuit recognized that each of their four causes of action is predicated on the alleged existence of a conspiracy among Respondents to violate, and to encourage NYSE members to violate, Section 11(a) of the Exchange Act. *D'Alessio*, 258 F.3d at 102 (Pet. App. at 16a) ("[T]he complaint is replete with allegations that the NYSE conspired to violate [the federal securities laws] and concocted a phoney interpretation of these laws and applicable NYSE rules that

it knowingly communicated to D'Alessio and other floor brokers to their detriment." (internal quotations omitted)). " '[T]he central premise' of D'Alessio's complaint 'is that the [NYSE and its various senior officials] violated and purposely encouraged [D'Alessio] and others to violate § 11(a) . . . by promulgating erroneous and misleading interpretations of that statutory provision.' " *Id.* (Pet. App. at 16a) (quoting *Frayler v. New York Stock Exch., Inc.*, 118 F. Supp. 2d 448, 450 (S.D.N.Y. 2000)). Consequently, "the vindication of [Petitioners' alleged] right[s] under state law necessarily turn[s] on [a] construction of federal law," *Franchise Tax Bd.*, 463 U.S. at 9, namely, Section 11(a).

While Petitioners argue that the federal issue here is "incidental," rather than "substantial," because there is no dispute that their conduct violated Section 11(a), Pet. at 5, this argument misses the point. Petitioners' "common law" claims are predicated on alleged violations of Section 11(a) *by Respondents*. Any court adjudicating such claims would necessarily have to construe Section 11(a) in order to determine whether Respondents' actions had violated the statute. The Second Circuit was therefore correct in holding that "the federal issue is substantial" because "the NYSE's alleged violations of the federal securities laws . . . underlie D'Alessio's state claw claims . . . ." *D'Alessio*, 258 F.3d at 102 (Pet. App. at 16a).[5]

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[5] The Second Circuit correctly distinguished the instant case from its prior decision in *Barbara v. New York Stock Exch., Inc.*, 99 F.3d 49 (2d Cir. 1996), explaining that resolution of the claims asserted in *Barbara* did not require construction or interpretation of a federal statute, but instead "required the district court to determine whether disciplinary proceedings initiated by the NYSE were consistent with its own internal rules and its contractual obligations to its members." *D'Alessio*, 258 F.3d at 101 (Pet. App. at 13a).

Petitioners' reliance on *Merrell Dow*, 478 U.S. 804 (1986), is misplaced. Pet. at 5. In *Merrell Dow*, this Court concluded that a substantial federal question was not presented where the federal statute allegedly violated merely created a "rebuttable presumption" of negligence. *Merrell Dow*, 478 U.S. at 812. In sharp contrast, Respondents' alleged participation in a conspiracy to violate, and cause others to violate, substantive obligations imposed by the federal securities laws is an essential element of each of the four causes of action asserted by Petitioners. As the Second Circuit noted, Section 27 of the Exchange Act vests exclusive jurisdiction in the federal courts over claims alleging violations of the federal securities laws and actions "brought to enforce any liability or duty created by the [Exchange Act] or the rules and regulations thereunder," 15 U.S.C. §78aa (Resp. App. at 20a), in recognition of the strong federal interest in resolving such questions. *D'Alessio*, 258 F.3d at 104 (Pet. App. at 18a).

B. The Complaint Presents a Substantial Federal Question Under Section 19(g)

Petitioners inexplicably ignore the Second Circuit's holding that federal jurisdiction was also supported by the complaint's allegations that the NYSE failed to satisfy its alleged "duty to its members to abide by and enforce its rules, and to accurately advise its members with respect to the securities laws." *D'Alessio*, 258 F.3d at 103-104 (Pet. App. at 17a-19a). As the Second Circuit recognized, the "source of the duty imposed upon the NYSE" to enforce and monitor compliance by its members with the Exchange Act "is found in *federal* law; namely in [Section 19(g) of] the Exchange Act." *Id.* at 103 (Pet. App. at 18a) (emphasis in original). Although the Complaint does not explicitly identify Section 19(g) as the source of this duty, federal jurisdiction

cannot be avoided by such "artful pleading" because "the propriety of the NYSE's actions, as prescribed under federal law . . . is at the heart of D'Alessio's allegations." *Id.* (Pet. App. at 18a).[6]

The Second Circuit correctly held that Petitioners' claims would require adjudication of the scope of Respondents' duties under Section 19(g) and whether Respondents adequately fulfilled those duties. *D'Alessio*, 258 F.3d at 103 (Pet. App. at 18a). Petitioners' attempt to "enforce [a] liability or duty created by" Section 19(g) creates a substantial federal question, over which the federal courts have exclusive jurisdiction under both 28 U.S.C. § 1331 (Resp. App. at 20a) and Section 27 of the Exchange Act. 15 U.S.C. § 78aa (Resp. App. at 20a).

II. The Second Circuit Properly Held That Respondents Are Entitled to Absolute Immunity When Performing Regulatory Functions Under the Exchange Act

A. The Second Circuit's Decision Is Consistent With Applicable Supreme Court Precedent

The Second Circuit explicitly "rejecte[d Petitioners'] attempts to limit . . . [the] application of the doctrine of absolute immunity to cases involving misconduct in connection with disciplinary proceedings and excluding

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[6] While Petitioners also attempt to identify a non-statutory basis for an alleged duty to provide them with interpretive advice by alleging that the NYSE had a contractual obligation to provide such interpretive advice, *see* Pet. at 3-4, the Second Circuit correctly recognized that, "D'Alessio's breach of contract claim against the NYSE only is based on the membership agreement executed by D'Alessio and the NYSE that is required under the Exchange Act for D'Alessio to execute trades on the NYSE floor." *D'Alessio*, 258 F.3d at 102 n.6 (Pet. App. at 15a n.6). Consequently, resolution of Petitioners' purported "contract" claim would also require the courts to define the scope of the NYSE's regulatory duties under the Exchange Act.

activities of the NYSE, as a[n] SRO, in performing quasi-governmental functions pursuant to the broad authority delegated to it by the Exchange Act." *D'Alessio*, 258 F.3d at 105 (Pet. App. at 21a). Petitioners argue that the Second Circuit's decision in *D'Alessio* is inconsistent with Supreme Court precedent restricting the doctrine of absolute immunity to "the prosecutorial and adjudicatory functions" of governmental or quasi-governmental officials. Pet. at 5 (citing *Butz v. Economou*, 438 U.S. 478 (1978); *Burns v. Reed*, 500 U.S. 478 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)). However, these cases are inapposite, because each of them involved alleged violations of rights arising directly under the U.S. Constitution. *See, e.g., Butz*, 438 U.S. at 480 (holding that the restriction of absolute immunity to cases involving prosecutorial, adjudicatory, or legislative functions was appropriate in the special context of "vindicat[ing] *constitutional* guarantees." (emphasis added)).

Butz did not disturb this Court's prior holding in *Barr v. Matteo*, 360 U.S. 564, 575 (1959), that government officials are absolutely immune from non-constitutional claims if the challenged conduct falls within the "outer perimeter" of their official authority. *Butz*, 438 U.S. at 489. The Second Circuit was therefore correct in affirming the district court's holding that NYSE officials are "entitled to absolute immunity for any actions within the 'outer perimeter' of the performance of such [regulatory] functions." *D'Alessio*, 125 F. Supp. 2d at 658 (Pet. App. at 28a) (citing *Barr*, 360 U.S. at 575).

In affirming the district court's decision, the Second Circuit noted that other circuit courts have likewise held SROs and their officials absolutely immune from damage suits arising from the exercise of their Exchange Act duties, regardless of whether the conduct alleged involved disciplinary proceedings. For example, in

Sparta Surgical Corp. v. National Ass'n of Secs. Dealers, Inc., 159 F.3d 1209, 1213-15 (9th Cir. 1998), the Ninth Circuit held that the NASD was absolutely immune from suit for claims arising from the NASD's decision to temporarily delist and suspend trading of plaintiff's stock on the opening day of its public offering. No allegations involving the NASD's disciplinary functions were made. Citing *Barbara*, the court stated that SROs enjoy absolute immunity from suits for damages "when they are acting *under the aegis of the Exchange Act's delegated authority* . . . ." *Id.* at 1214 (emphasis added).

In *Partnership Exchange Secs. Co. v. National Ass'n of Secs. Dealers, Inc.*, 169 F.3d 606, 608 (9th Cir. 1999), the Ninth Circuit again held that the NASD was absolutely immune from a suit for money damages arising from: (1) the NASD's alleged failure to advise plaintiff that its activities violated a new interpretation of an NASD rule; and (2) the NASD's subsequent attempt to discipline plaintiff for violating this new interpretation. Although the SEC had already found the NASD's new interpretation to be incorrect, *see id.* at 607, the Ninth Circuit found the NASD to be absolutely immune from suit because "underlying all of [the plaintiff's] allegations contained in its complaint is the NASD's conduct *undertaken under the authority delegated to it by the Exchange Act.*" *Id.* at 608 (emphasis added). The Ninth Circuit did not limit the application of absolute immunity to only those allegations involving the disciplinary proceedings.

B. All of the Conduct Alleged in the Complaint Involves the NYSE's Regulatory Functions

While not disputing that Respondents' alleged failure to provide Petitioners with "interpretive advice" involved Respondents' exercise of regulatory duties delegated by

the Exchange Act, Petitioners argue that their "contract" claim, and their claim that Respondents gave false information to federal law enforcement officials, did not involve regulatory functions and therefore should not have been subject to the doctrine of absolute immunity. Pet. at 7-8. Both of these arguments were properly rejected by the Second Circuit.

With respect to the contract claim, the Second Circuit correctly held that the "alleged misconduct of the NYSE as detailed in the complaint," and not the "manner in which [Petitioner D'Alessio] casts his claims against the NYSE (*i.e.* tort or contract)," determines whether the NYSE is entitled to absolute immunity in this case. *D'Alessio*, 258 F.3d at 105-106 (Pet. App. at 22a). The alleged contract between Petitioners and the NYSE was "the membership agreement . . . *required under the Exchange Act* for D'Alessio to execute trades on the NYSE floor." *Id.* at 102 n.6 (Pet. App. at 15a n.6) (emphasis added). Thus, even assuming *arguendo* that the membership agreement obligated the NYSE to provide Petitioners interpretive advice about the federal securities laws, such an obligation would clearly involve the NYSE's exercise of its regulatory duties under the Exchange Act. The provision of interpretive advice to NYSE members concerning compliance with the federal securities laws, whether characterized as imposed by a contract or directly by statute, is unquestionably a quasi-governmental function.

The Second Circuit also correctly found that the NYSE was exercising its regulatory duties under the Exchange Act when it provided information to the USAO during the criminal investigation of Petitioners' violations of the securities laws. Petitioners argue that the Second Circuit made a "factual error" in characterizing the NYSE's provision of information to the USAO as part of its "referral" function because of Petitioners'

assertion that the NYSE was itself a target of the investigation when the statements were made. Pet. at 7. The Second Circuit could not have committed such error because this allegation appears nowhere in the complaint. Even if it were, the allegation would add nothing to Petitioners' argument that the NYSE's alleged misstatements to federal law enforcement officials should not be considered part of the NYSE's "referral" function because the NYSE had improper motives in making such statements. *See* Pet. at 2. Absolute immunity attaches to the NYSE's exercise of its regulatory duties regardless of alleged bad motives. *See, e.g., Butz*, 438 U.S. at 492-95 (discussing *Spalding v. Vilas*, 161 U.S. 483 (1896) and *Barr*); *Barr*, 360 U.S. at 569, 571-72, 575; *Barbara*, 99 F.3d at 59 (NYSE absolutely immune despite allegation that the NYSE enforced an order barring plaintiff from its trading floor even *after* its Board of Directors had stayed the order and reversed all charges against the plaintiff); *Sparta*, 159 F.3d at 1215 (NASD absolutely immune despite allegations of "bad faith" in suspension of trading); *Austin Mun. Secs., Inc. v. National Ass'n of Secs. Dealers, Inc.*, 757 F.2d 676, 687-93 (5th Cir. 1995) (NASD absolutely immune from suit for alleged conspiracy to force plaintiff out of business). The NYSE's statements in response to the USAO inquiry were unquestionably related to its "duty [to] identify[ ] potential violations of the federal securities laws and assist[ ] in any criminal or civil investigation arising from a member's noncompliance . . . ." *D'Alessio*, 258 F.3d at 103 (Pet. App. at 18a).

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition for a writ of certiorari.

Dated: New York, New York
November 9, 2001

Respectfully submitted,

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CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS CITED

U.S. Const. art. III. § 2, cl.1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

15 U.S.C. § 78c(a)(26)

§ 78c. Definitions and application

(a) Definitions

When used in this chapter, unless the context otherwise requires—

(26) The term "self-regulatory organization" means any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of sections 78s(b), 78s(c), and 78w(b) of this title) the Municipal Securities Rulemaking Board established by section 78o-4 of this title.

15 U.S.C. § 78f

§ 78f. National securities exchanges

(a) Registration; application

An exchange may be registered as a national securities exchange under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 78s(a) of this title, by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the exchange and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) Determination by Commission requisite to registration of applicant as a national securities exchange.

An exchange shall not be registered as a national securities exchange unless the Commission determines that—

(1) Such exchange is so organized and has the capacity to be able to carry out the purposes of this chapter and to comply, and (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this chapter, the rules and regulations thereunder, and the rules of the exchange.

(2) Subject to the provisions of subsection (c) of this section, the rules of the exchange provide that any registered broker or dealer or natural person associated with a registered broker or dealer may become a member of such exchange and any person may become associated with a member thereof.

(3) The rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.

(4) The rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

(5) The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the exchange.

(6) The rules of the exchange provide that (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of the provisions of this chapter, the rules or regulations thereunder, or the rules of the exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

(7) The rules of the exchange are in accordance with the provisions of subsection (d) of this section, and in general, provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange or a member thereof.

(8) The rules of the exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.

(9) The rules of the exchange prohibit the listing of any security issued in a limited partnership rollup transaction (as such term is defined in paragraphs (4) and (5) of section 78n(h) of this title), unless such transaction was conducted in accordance with procedures designed to protect the rights of limited partners, including—

(A) the right of dissenting limited partners to one of the following:

(i) an appraisal and compensation;

(ii) retention of a security under substantially the same terms and conditions as the original issue;

(iii) approval of the limited partnership rollup transaction by not less than 75 percent of the outstanding securities of each of the participating limited partnerships;

(iv) the use of a committee of limited partners that is independent, as determined in accordance with rules prescribed by the exchange, of the general partner or sponsor, that has been approved by a majority of the outstanding units of each of the participating limited

partnerships, and that has such authority as is necessary to protect the interest of limited partners, including the authority to hire independent advisors, to negotiate with the general partner or sponsor on behalf of the limited partners, and to make a recommendation to the limited partners with respect to the proposed transaction; or

(v) other comparable rights that are prescribed by rule by the exchange and that are designed to protect dissenting limited partners;

(B) the right not to have their voting power unfairly reduced or abridged;

(C) the right not to bear an unfair portion of the costs of proposed limited partnership rollup transaction that is rejected; and

(D) restrictions on the conversion of contingent interests or fees into non-contingent interests or fees and restrictions on the receipt of a non-contingent equity interest in exchange for fees for services which have not yet been provided.

As used in this paragraph, the term "dissenting limited partner" means a person who, on the date on which soliciting material is mailed to investors, is a holder of a beneficial interest in a limited partnership that is the subject of a limited partnership rollup transaction, and who casts a vote against the transaction and complies with procedures established by the exchange, except that for purposes of an exchange or tender offer, such person shall file an objection in writing under the rules of the exchange during the period during which the offer is outstanding.

(c) Denial of membership in national exchanges; denial of association with member; conditions; limitation of membership

(1) A national securities exchange shall deny membership to (A) any person, other than a natural person, which is not a registered broker or dealer or (B) any natural person who is not, or is not associated with, a registered broker or dealer.

(2) A national securities exchange may, and in cases in which the Commission, by order, directs as necessary or appropriate in the public interest or for the protection of investors shall, deny membership to any registered broker or dealer or natural person associated with a registered broker or dealer, and bar from becoming associated with a member any person, who is subject to a statutory disqualification. A national securities exchange shall file notice with the Commission not less than thirty days prior to admitting any person to membership or permitting any person to become associated with a member, if the exchange knew, or in the exercise of reasonable care should have known, that such person was subject to a statutory disqualification. The notice shall be in such form and contain such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3)(A) A national securities exchange may deny membership to, or condition the membership of, a registered broker or dealer if (i) such broker or dealer does not meet such standards of financial responsibility or operational capability or such broker or dealer or any natural person associated with such broker or dealer does not meet such standards of training, experience, and competence as are prescribed by the rules of the exchange or

(ii) such broker or dealer or person associated with such broker or dealer has engaged and there is a reasonable likelihood he may again engage in acts or practices inconsistent with just and equitable principles of trade. A national securities exchange may examine and verify the qualifications of an applicant to become a member and the natural persons associated with such an applicant in accordance with procedures established by the rules of the exchange.

(B) A national securities exchange may bar a natural person from becoming a member or associated with a member, or condition the membership of a natural person or association of a natural person with a member, if such natural person (i) does not meet such standards of training, experience, and competence as are prescribed by the rules of the exchange or (ii) has engaged and there is a reasonable likelihood he may again engage in acts or practices inconsistent with just and equitable principles of trade. A national securities exchange may examine and verify the qualifications of an applicant to become a person associated with a member in accordance with procedures established by the rules of the exchange and require any person associated with a member, or any class of such persons, to be registered with the exchange in accordance with procedures so established.

(C) A national securities exchange may bar any person from becoming associated with a member if such person does not agree (i) to supply the exchange with such information with respect to its relationship and dealings with the member as may be specified in the rules of the exchange and (ii) to permit the examination of its books and records to verify the accuracy of any information so supplied.

(4) A national securities exchange may limit (A) the number of members of the exchange and (B) the number of members and designated representatives of members permitted to effect transactions on the floor of the exchange without the services of another person acting as broker: *Provided, however,* That no national securities exchange shall have the authority to decrease the number of memberships in such exchange, or the number of members and designated representatives of members permitted to effect transactions on the floor of such exchange without the services of another person acting as broker, below such number in effect on May 1, 1975, or the date such exchange was registered with the Commission, whichever is later: *And provided further,* That the Commission, in accordance with the provisions of section 78s(c) of this title, may amend the rules of any national securities exchange to increase (but not to decrease) or to remove any limitation on the number of memberships in such exchange or the number of members or designated representatives of members permitted to effect transactions on the floor of the exchange without the services of another person acting as broker, if the Commission finds that such limitation imposes a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.

(d) Discipline of national securities exchange members and persons associated with members; summary proceedings

(1) In any proceeding by a national securities exchange to determine whether a member or person associated with a member should be disciplined (other than a summary proceeding pursuant to paragraph (3) of this subsection), the exchange shall bring specific charges, notify such member or person of, and give him an oppor-

tunity to defend against, such charges, and keep a record. A determination by the exchange to impose a disciplinary sanction shall be supported by a statement setting forth—

(A) any act or practice in which such member or person associated with a member has been found to have engaged, or which such member or person has been found to have omitted;

(B) the specific provision of this chapter, the rules or regulations thereunder, or the rules of the exchange which any such act or practice, or omission to act, is deemed to violate; and

(C) the sanction imposed and the reasons therefor.

(2) In any proceeding by a national securities exchange to determine whether a person shall be denied membership, barred from becoming associated with a member, or prohibited or limited with respect to access to services offered by the exchange or a member thereof (other than a summary proceeding pursuant to paragraph (3) of this subsection), the exchange shall notify such person of, and give him an opportunity to be heard upon, the specific grounds for denial, bar, or prohibition or limitation under consideration and keep a record. A determination by the exchange to deny membership, bar a person from becoming associated with a member, or prohibit or limit a person with respect to access to services offered by the exchange or a member thereof shall be supported by a statement setting forth the specific grounds on which the denial, bar, or prohibition or limitation is based.

(3) A national securities exchange may summarily (A) suspend a member or person associated with a member who has been and is expelled or suspended from any self-regulatory organization or barred or suspended from

being associated with a member of any self-regulatory organization, (B) suspend a member who is in such financial or operating difficulty that the exchange determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors, creditors, other members, or the exchange, or (C) limit or prohibit any person with respect to access to services offered by the exchange if subparagraph (A) or (B) of this paragraph is applicable to such person or, in the case of a person who is not a member, if the exchange determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, members, or the exchange. Any person aggrieved by any such summary action shall be promptly afforded an opportunity for a hearing by the exchange in accordance with the provisions of paragraph (1) or (2) of this subsection. The Commission, by order, may stay any such summary action on its own motion or upon application by any person aggrieved thereby, if the Commission determines summarily or after notice and opportunity for hearing (which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that such stay is consistent with the public interest and the protection of investors.

(e) Commissions, allowances, discounts, and other fees

(1) On and after June 4, 1975, no national securities exchange may impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members: *Provided, however,* That until May 1, 1976, the preceding provisions of this paragraph shall not prohibit any such exchange from imposing or

fixing any schedule of commissions, allowances, discounts, or other fees to be charged by its members for acting as broker on the floor of the exchange or as odd-lot dealer: *And provided further,* That the Commission, in accordance with the provisions of section 78s(b) of this title as modified by the provisions of paragraph (3) of this subsection, may—

(A) permit a national securities exchange, by rule, to impose a reasonable schedule or fix reasonable rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange prior to November 1, 1976, if the Commission finds that such schedule or fixed rates of commissions, allowances, discounts, or other fees are in the public interest; and

(B) permit a national securities exchange, by rule, to impose a schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange after November 1, 1976, if the Commission finds that such schedule or fixed rates of commissions, allowances, discounts, or other fees (i) are reasonable in relation to the costs of providing the service for which such fees are charged (and the Commission publishes the standards employed in adjudging reasonableness) and (ii) do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter, taking into consideration the competitive effects of permitting such schedule or fixed rates weighed against the competitive effects of other lawful actions which the Commission is authorized to take under this chapter.

(2) Notwithstanding the provisions of section 78s(c) of this title, the Commission, by rule, may abrogate any exchange rule which imposes a schedule or fixes rates of

commissions, allowances, discounts, or other fees, if the Commission determines that such schedule or fixed rates are no longer reasonable, in the public interest, or necessary to accomplish the purposes of this chapter.

(3)(A) Before approving or disapproving any proposed rule change submitted by a national securities exchange which would impose a schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange, the Commission shall afford interested persons (i) an opportunity for oral presentation of data, views, and arguments and (ii) with respect to any such rule concerning transactions effected after November 1, 1976, if the Commission determines there are disputed issues of material fact, to present such rebuttal submissions and to conduct (or have conducted under subparagraph (B) of this paragraph) such cross-examination as the Commission determines to be appropriate and required for full disclosure and proper resolution of such disputed issues of material fact.

(B) The Commission shall prescribe rules and make rulings concerning any proceeding in accordance with subparagraph (A) of this paragraph designed to avoid unnecessary costs or delay. Such rules or rulings may (i) impose reasonable time limits on each interested person's oral presentations, and (ii) require any cross-examination to which a person may be entitled under subparagraph (A) of this paragraph to be conducted by the Commission on behalf of that person in such manner as the Commission determines to be appropriate and required for full disclosure and proper resolution of disputed issues of material fact.

(C)(i) If any class of persons, the members of which are entitled to conduct (or have conducted) cross-

examination under subparagraphs (A) and (B) of this paragraph and which have, in the view of the Commission, the same or similar interests in the proceeding, cannot agree upon a single representative of such interests for purposes of cross-examination, the Commission may make rules and rulings specifying the manner in which such interests shall be represented and such cross-examination conducted.

(ii) No member of any class of persons with respect to which the Commission has specified the manner in which its interests shall be represented pursuant to clause (i) of this subparagraph shall be denied, pursuant to such clause (i), the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if he satisfies the Commission that he has made a reasonable and good faith effort to reach agreement upon group representation and there are substantial and relevant issues which would not be presented adequately by group representation.

(D) A transcript shall be kept of any oral presentation and cross-examination.

(E) In addition to the bases specified in section 78y(a) of this title, a reviewing Court may set aside an order of the Commission under section 78s(b) of this title approving an exchange rule imposing a schedule or fixing rates of commissions, allowances, discounts, or other fees, if the Court finds—

(1) a Commission determination under subparagraph (A) of this paragraph that an interested person is not entitled to conduct cross-examination or make rebuttal submissions, or

(2) a Commission rule or ruling under subparagraph (B) of this paragraph limiting the petitioner's cross-

examination or rebuttal submissions, has precluded full disclosure and proper resolution of disputed issues of material fact which were necessary for fair determination by the Commission.

(f) Compliance of non-members with exchange rules

The Commission, by rule or order, as it deems necessary or appropriate in the public interest and for the protection of investors, to maintain fair and orderly markets, or to assure equal regulation, may require—

(1) any person not a member or a designated representative of a member of a national securities exchange effecting transactions on such exchange without the services of another person acting as a broker, or

(2) any broker or dealer not a member of a national securities exchange effecting transactions on such exchange on a regular basis, to comply with such rules of such exchange as the Commission may specify.

15 U.S.C. § 78k(a)

§ 78k. Trading by members of exchanges, brokers, and dealers

(a) Trading for own account or account of associated person; exceptions

(1) It shall be unlawful for any member of a national securities exchange to effect any transaction on such exchange for its own account, the account of an associated person, or an account with respect to which it or an associated person thereof exercises investment discretion: *Provided, however,* That this paragraph shall not make unlawful—

(A) any transaction by a dealer acting in the capacity of market maker;

(B) any transaction for the account of an odd-lot dealer in a security in which he is so registered;

(C) any stabilizing transaction effected in compliance with rules under section 78j(b) of this title to facilitate a distribution of a security in which the member effecting such transaction is participating;

(D) any bona fide arbitrage transaction, any bona fide hedge transaction involving a long or short position in an equity security and a long or short position in a security entitling the holder to acquire or sell such equity security, or any risk arbitrage transaction in connection with a merger, acquisition, tender offer, or similar transaction involving a recapitalization;

(E) any transaction for the account of a natural person, the estate of a natural person, or a trust created by a natural person for himself or another natural person;

(F) any transaction to offset a transaction made in error;

(G) any other transaction for a member's own account provided that (i) such member is primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, and acting as broker, or any one or more of such activities, and whose gross income normally is derived principally from such business and related activities and (ii) such transaction is effected in compliance with rules of the Commission which, as a minimum, assure that the transaction is not inconsistent with the maintenance of fair and orderly markets and yields priority, parity, and precedence in execution to orders for

the account of persons who are not members or associated with members of the exchange;

(H) any transaction for an account with respect to which such member or an associated person thereof exercises investment discretion if such member—

(i) has obtained, from the person or persons authorized to transact business for the account, express authorization for such member or associated person to effect such transactions prior to engaging in the practice of effecting such transactions;

(ii) furnishes the person or persons authorized to transact business for the account with a statement at least annually disclosing the aggregate compensation received by the exchange member in effecting such transactions; and

(iii) complies with any rules the Commission has prescribed with respect to the requirements of clauses (i) and (ii); and

(I) any other transaction of a kind which the Commission, by rule, determines is consistent with the purposes of this paragraph, the protection of investors, and the maintenance of fair and orderly markets.

(2) The Commission, by rule, as it deems necessary or appropriate in the public interest and for the protection of investors, to maintain fair and orderly markets, or to assure equal regulation of exchange markets and markets occurring otherwise than on an exchange, may regulate or prohibit:

(A) transactions on a national securities exchange not unlawful under paragraph (1) of this subsection effected by any member thereof for its own account (unless such member is acting in the capacity of market maker or odd-lot dealer), the account of an associated

person, or an account with respect to which such member or an associated person thereof exercises investment discretion;

(B) transactions otherwise than on a national securities exchange effected by use of the mails or any means or instrumentality of interstate commerce by any member of a national securities exchange, broker, or dealer for the account of such member, broker, or dealer (unless such member, broker, or dealer is acting in the capacity of a market maker) the account of an associated person, or an account with respect to which such member, broker, or dealer or associated person thereof exercises investment discretion; and

(C) transactions on a national securities exchange effected by any broker or dealer not a member thereof for the account of such broker or dealer (unless such broker or dealer is acting in the capacity of market maker), the account of an associated person, or an account with respect to which such broker or dealer or associated person thereof exercises investment discretion.

(3) The provisions of paragraph (1) of this subsection insofar as they apply to transactions on a national securities exchange effected by a member thereof who was a member on February 1, 1978 shall not become effective until February 1, 1979. Nothing in this paragraph shall be construed to impair or limit the authority of the Commission to regulate or prohibit such transactions prior to February 1, 1979, pursuant to paragraph (2) of this subsection.

15 U.S.C. § 78s(g)

§ 78s. Registration, responsibilities, and oversight of self-regulatory organizations

(g) Compliance with rules and regulations

(1) Every self-regulatory organization shall comply with the provisions of this chapter, the rules and regulations thereunder, and its own rules, and (subject to the provisions of section 78q(d) of this title, paragraph (2) of this subsection, and the rules thereunder) absent reasonable justification or excuse enforce compliance—

(A) in the case of a national securities exchange, with such provisions by its members and persons associated with its members;

(B) in the case of a registered securities association, with such provisions and the provisions of the rules of the Municipal Securities Rulemaking Board by its members and persons associated with its members; and

(C) in the case of a registered clearing agency, with its own rules by its participants.

(2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this chapter, may relieve any self-regulatory organization of any responsibility under this chapter to enforce compliance with any specified provision of this chapter or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.

15 U.S.C. § 78s(h)(1)

§ 78s. Registration, responsibilities, and oversight of self-regulatory organizations

(h) Suspension or revocation of self-regulatory organization's registration; censure; other sanctions

(1) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or revoke the registration of such self-regulatory organization, or to censure or impose limitations upon the activities, functions, and operations of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply with any provision of this chapter, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance—

(A) in the case of a national securities exchange, with any such provision by a member thereof or a person associated with a member thereof;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by a member thereof or a person associated with a member thereof; or

(C) in the case of a registered clearing agency, with any provision of its own rules by a participant therein.

15 U.S.C. § 78aa

§ 78aa. Jurisdiction of offenses and suits

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the

time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

17 C.F.R. 240.11a-1

§ 240.11a-1. Regulation of floor trading.

(a) No member of a national securities exchange, while on the floor of such exchange, shall initiate, directly or indirectly, any transaction in any security admitted to trading on such exchange, for any account in which such member has an interest, or for any such account with respect to which such member has discretion as to the time of execution, the choice of security to be bought or sold, the total amount of any security to be bought or sold, or whether any such transaction shall be one of purchase or sale.

(b) The provisions of paragraph (a) of this section shall not apply to:

(1) Any transaction by a registered specialist in a security in which he is so registered on such exchange;

(2) Any transaction for the account of an odd-lot dealer in a security in which he is so registered on such exchange;

(3) Any stabilizing transaction effected in compliance with § 242.104 of this chapter to facilitate a distribution of such security in which such member is participating;

(4) Any bona fide arbitrage transaction;

(5) Any transaction made with the prior approval of a floor official of such exchange to permit such member to contribute to the maintenance of a fair and orderly market in such security, or any purchase or sale to reverse any such transaction;

(6) Any transaction to offset a transaction made in error; or

(7) Any transaction effected in conformity with a plan designed to eliminate floor trading activities which are not beneficial to the market and which plan has been adopted by an exchange and declared effective by the Commission. For the purpose of this rule, a plan filed with the Commission by a national securities exchange shall not become effective unless the Commission, having due regard for the maintenance of fair and orderly markets, for the public interest, and for the protection of investors, declares the plan to be effective.

(c) For the purpose of this rule the term "on the floor of such exchange" shall include the trading floor; the rooms, lobbies, and other premises immediately adjacent thereto for use of members generally; other rooms, lobbies and premises made available primarily for use by members generally; and the telephone and other facilities in any such place.

(d) Any national securities exchange may apply for an exemption from the provisions of this rule in compliance with the provisions of section 11(c) of the Act.